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Untied States: American Expansion and Territorial Deannexation

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At the beginning of the twentieth century the United States laid claim to an overseas empire, consolidating its victory in the Spanish-American War by adopting novel structures of colonial rule over a brace of newly acquired island territories. A set of Supreme Court decisions known collectively as the Insular Cases *established the legal authorization for this undertaking. As the traditional story goes, they did so by holding that the U.S. Constitution did not "follow the flag" to the recently annexed possessions in the Pacific Ocean and the Caribbean Sea: thus unfettered, an ambitiously imperial nation could attend to the business of governing* outre-mer *peoples and places without undue attention to the republican niceties that obtained on native soil.*

This Article argues that this reading of the Insular Cases *is fundamentally wrong. That the cases inaugurated an American empire cannot be denied. But they did not do so by creating a "Constitution-free zone" under U.S. sovereignty. Instead, the epochal significance of the cases lies in their careful creation of a new kind of U.S. territory: a domestic territory that could be governed temporarily, and then later, if necessary, be relinquished. This was no small matter for Americans contemplating a global demesne, since the Civil War had, not so long before, inscribed in blood the indivisibility of the Union; in the* Insular Cases, *the Supreme Court ensured that this costly principle would not bind America to its colonial periphery. In sum, the* Insular Cases *installed a doctrine of territorial deannexation in American constitutional jurisprudence, and in doing so they created the conditions of possibility for an American experiment with colonial governance.*

The experiment was not, finally, an unqualified success, but the Insular Cases *remain good law, shaping life for more than four million U.S. citizens in Puerto Rico and the other remaining*

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nonstate possessions, and doing service in recent cases dealing with the extraterritorial applicability of the Constitution. In view of this durable legacy, a properly revised understanding of the Insular Cases *is essential.*

> Are the United States so bound and tied by this Constitution of ours that it can never acquire an island of the sea?[1]

This Article offers a revisionist interpretation of the *Insular Cases* of 1901.[2] Best known as the Supreme Court decisions that held that the Constitution did not "follow the flag"[3] to the islands annexed by the United States after the Spanish-American War—the Philippines, Puerto Rico, and Guam[4]—the *Insular Cases* famously gave judicial

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1 Brief for the United States, *Goetze v United States*, No 340 (US 1900), reprinted in Albert H. Howe, ed, *The Insular Cases: Comprising the Records, Briefs, and Arguments of Counsel in the Insular Cases of the October Term, 1900, in the Supreme Court of the United States, Including the Appendixes Thereto* 137, 171 (GPO 1901). The quoted sentence uses both the plural "are" and the singular "it" with reference to the same subject: the United States. Although at first glance this dual use appears to be a grammatical mistake, I suggest in this Article that the debate over American imperialism at the turn of the twentieth century resurrected a question that the Civil War was supposed to have laid to rest: whether the United States should be considered a singular or plural entity; whether these united States had truly become this United States. Compare, for example, James M. McPherson, *Abraham Lincoln and the Second American Revolution* viii (Oxford 1991) (discussing the use of "United States" in singular and plural form). I have written in more detail elsewhere about the phrase "United States" itself. See Christina Duffy Burnett, *The Constitution and Deconstitution of the United States*, in Sanford Levinson and Bartholomew Sparrow, eds, *The Louisiana Purchase and American Expansion 1803–1898* (Rowman & Littlefield 2005).

2 I focus on eight of the *Insular Cases*, see Parts II.B and III.A, and in particular on *De Lima v Bidwell*, 182 US 1 (1901), and *Downes v Bidwell*, 182 US 244 (1901). For discussions of which cases belong under the rubric of the "*Insular Cases*," see Christina Duffy Burnett, *A Note on the* Insular Cases, in Christina Duffy Burnett and Burke Marshall, eds, *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* 389–92 (Duke 2001) (positing a more inclusive understanding of which cases fall under the umbrella term *Insular Cases*); Efrén Rivera Ramos, *The Legal Construction of American Colonialism:* The Insular Cases *(1901–1922)*, 65 Revista Jurídica Universidad Puerto Rico 225, 240–41 & nn 40–42 (1996) (laying out a broad but relatively traditional understanding of which cases fall under the umbrella term *Insular Cases*); Stanley K. Laughlin, Jr., *The Law of United States Territories and Affiliated Jurisdictions* § 7:2 at 114 (Law Co-op 1995) ("Six cases decided during the Supreme Court's 1900 term comprise the *Insular Cases*, although later decisions treating the status of territories are sometimes subsumed under the title."). See also id § 7:1 at 106. Laughlin characterizes his lists at 114 and nn 34–35 as "complete." Id § 7:7 at 123 n 78. See also Bartholomew H. Sparrow, *Emergence of Empire: The* Insular Cases *and the Territorial Expansion of the United States* appendix A (forthcoming Kansas) (setting forth an alternative and considerably longer list).

3 See, for example, Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex L Rev 1, 231 (2002) (noting that the doctrinal transformation that occurred in 1901 "was sufficiently radical to provoke Mr. Dooley's famous observation that 'no matter whether th' constitution follows th' flag or not, th' supreme coort follws th' iliction returns'").

4 The United States also took control over Cuba, despite having disclaimed any intention to assert sovereignty over the island. See Joint Resolution for the Recognition of the Independence of the People of Cuba, Demanding That the Government of Spain Relinquish Its Authority and Government in the Island of Cuba, and to Withdraw Its Land and Naval Forces from Cuba

sanction to American imperialism at the turn of the twentieth century.[5] They did so, it is said, in two ways: by withholding all but a few constitutional protections from the new territories, and by denying them a promise of statehood. In this Article, however, I argue that the *Insular Cases* served the aims of empire in a different and unexpected way: not by opening the door to the annexation of American colonies, but by paving the way for their release. The retreat of American colonial rule, not its projection, was what the *Insular Cases* authorized, through a constitutional doctrine of territorial deannexation.[6]

Throughout the nineteenth century, the United States annexed territories with a view toward expanding the boundaries of a constitutional republic through the admission of new states into the Union.[7] In 1898, however, the McKinley administration embarked on an altogether different project: the acquisition of colonies, not as a means toward the end of making new states, but as an end in itself. In 1901,

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and Cuban Waters, and Directing the President of the United States to Use the Land and Naval Forces of the United States to Carry These Resolutions into Effect, J Res 24, 55th Cong, 2d Sess (Apr 20, 1898), in 30 Stat 738, 739 (1899) ("Teller Amendment") (amending the resolution declaring war on Spain). For the Supreme Court's discussion of Cuba's relationship to the United States, see *Neely v Henkel (No 1)*, 180 US 109, 120–22 (1901) (holding that, despite U.S. occupation, Cuba was a foreign country, and therefore extradition to Cuba from the United States was proper).

5 See generally Burnett and Marshall, eds, *Foreign in a Domestic Sense* (cited in note 2); José Trías Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* (Yale 1997); Rivera Ramos, 65 Revista Jurídica Universidad Puerto Rico at 228 (cited in note 2); Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* 117 (Puerto Rico 1985). Spain ceded its former colonies via the treaty of peace concluding the Spanish-American War. See Treaty of Peace Between the United States and the Kingdom of Spain, 30 Stat 1754, Treaty Ser No 343 (1898) ("Treaty of Paris").

6 I have chosen to use the term "deannexation" in order to emphasize that the doctrine authorized a change of heart, a reversal, after annexation. Although he does not attribute the constitutionality of deannexation to the doctrine of territorial incorporation, Owen Fiss uses the term "deannexation" to refer to these territories' potential for independence. See Owen M. Fiss, 8 *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888–1910* 236 (MacMillan 1993) ("There was, moreover, one option available to Congress and the president in the *Insular Cases* that was not available in the slavery controversy: deannexation.").

7 See generally D.W. Meinig, 2 *The Shaping of America: A Geographical Perspective on 500 Years of History: Continental America, 1800–1867* (Yale 1993); Grupo de Investigadores Puertorriqueños, 1–2 *Breakthrough from Colonialism: An Interdisciplinary Study of Statehood* (Puerto Rico 1984).

One important though limited exception to the practice of making states out of annexed territories involved the lands eventually reserved for Native Americans. See, for example, Meinig, 2 *The Shaping of America* at 78–103. Another, less well known, involved guano islands. During the scramble for guano islands in the mid-nineteenth century, the United States claimed over seventy of these islands. See Jimmy M. Skaggs, *The Great Guano Rush: Entrepreneurs and American Overseas Expansion* 230–36 (St. Martin's 1994). See also Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, in Mary Dudziak and Leti Volpp, eds, *Legal Borderlands: Law and the Construction of American Borders*, Am Q Special Issue (2005).

the Court took up the question of the constitutional status of these new territories, and in the *Insular Cases* it produced the unprecedented doctrine of territorial incorporation.[8] This doctrine divided domestic territory—that is, territory within the internationally recognized boundaries of the United States and subject to its sovereignty—into two categories: those places "incorporated" into the United States and forming an integral part thereof (including the states, the District of Columbia, and the "incorporated territories"); and those places not incorporated into the United States, but merely "belonging" to it (which came to be known as the "unincorporated territories").[9]

According to the standard account of the *Insular Cases*, the doctrine of territorial incorporation had two consequences, both of which served the turn-of-the-century American imperialist agenda: first, the Constitution applied in its entirety in those places that had been incorporated into the United States, while only its "fundamental" provisions applied in those places left unincorporated; and, second, incorporated territories enjoyed an implicit promise of eventual admission into the Union as states, while unincorporated territories were denied such a promise.[10] In these two ways, the *Insular Cases* supposedly

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[8] The doctrine did not acquire its name immediately, although the word "incorporation" was associated with it from the start. See, for example, Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 60 Am L Rev 801, 806 (1926) (referring to the "new, and, scarce suggested doctrine, that of constitutional '*incorporation*' of territory").

[9] In his concurrence setting forth the doctrine, Justice Edward Douglass White did not refer to "unincorporated" territories as such, but discussed whether the territories ceded by Spain had been "incorporated" into the United States and referred to the "disincorporation" of territory. *Downes*, 182 US at 319, 326, 341 (White concurring). Justice Joseph McKenna also referred to the incorporation of the new territories in his dissent in *De Lima* (handed down the same day, and joined by Justices White and George Shiras, Jr.). See 182 US at 215, 217 (McKenna dissenting). According to one author, the word "incorporation" appeared just once in the parties' briefs, namely in that of the plaintiff in *Huus v New York and Porto Rico Steamship Co*, 182 US 392 (1901). See James E. Kerr, *The Insular Cases: The Role of the American Judiciary in American Expansionism* 54 (Kennikat 1982). The Court first used the term "unincorporated" in *Rassmussen v United States*, 197 US 516, 525 (1905).

As for the idea that unincorporated territories "belonged" to the United States, Justice Henry Billings Brown referred to territories as "appurtenant and belonging to the United States," *Downes*, 182 US at 287, while Justice White referred to unincorporated territories as "appurtenant" to the United States "as a possession." Id at 342 (White concurring). The idea that unincorporated territories "belonged" to the United States would take hold along with the doctrine itself. See, for example, *Balzac v Porto Rico*, 258 US 298, 304–05 (1922) (distinguishing between incorporated "Territories of the United States" and "territory belonging to the United States which has not been incorporated into the Union," and noting that "neither the Philippines nor Porto Rico was territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it"); *Dorr v United States*, 195 US 138, 148 (1904) (referring to the unincorporated territories as "outlying territory belonging to the United States").

[10] For relevant scholarly works, see notes 39–40 and accompanying text; for relevant case law, see note 101 and accompanying text. I depart here as well from my own earlier analysis of the *Insular Cases*. See Christina Duffy Burnett and Burke Marshall, *Between the Foreign and the*

broke with precedent. Nineteenth-century territories, by contrast, had always been within the scope of the Constitution and on their way to becoming states.[11] By leaving the unincorporated territories "largely in an extraconstitutional zone,"[12] and denying them a promise of eventual admission into statehood, the doctrine of territorial incorporation gave Congress unprecedented flexibility in governing its new colonies—unhindered by most constitutional restrictions, and for as long as it pleased. Thus, according to the standard account, did the *Insular Cases* stretch a republican Constitution to embrace a colonial empire.

In this Article, I challenge the standard account. I do not disagree that the *Insular Cases* facilitated American imperialism, nor do I dispute the claim that the doctrine of territorial incorporation divided places subject to U.S. sovereignty into those within the boundaries of a narrowly defined "United States," and those somehow outside those boundaries, yet still subject to U.S. sovereignty. Beyond that, however, I argue that the *Insular Cases* have been misunderstood, both with respect to the applicability of the Constitution and with respect to the political relations between the United States and the unincorporated territories, or what is known as these territories' political status.[13] As a consequence, scholars have entirely overlooked the most critical contribution of the *Insular Cases* to the constitutional law of American territorial expansion.

With respect to the applicability of constitutional provisions, I argue that the significance of the distinction between incorporated and unincorporated territories has been substantially exaggerated. Contrary to the long-standing consensus, the incorporated/unincorporated distinction did not mirror a distinction between places where the Constitution applied "in full" and places where only its "fundamental"

Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented, in Burnett and Marshall, eds, *Foreign in a Domestic Sense* 1, 2 (cited in note 2). In that introductory essay, we questioned the first part of the standard account (concerning the applicability of the Constitution), though without engaging in the detailed analysis offered in Part II of this Article; as far as the second part of the standard account, we emphasized the denial of statehood, without offering the deannexationist interpretation proposed in Part III of this Article.

11 Although precisely how the Constitution operated in the territories had been the subject of much dispute. See Part II.A. For a description of the turn-of-the-century break with nineteenth-century patterns of territorial governance, see Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 6–16 (Martinus Nijhoff 1989).

12 Cleveland uses this phrase, but many others have expressed the same idea. See Cleveland, 81 Tex L Rev at 238 (cited in note 3). See also notes 39–40, 101 and accompanying text. Although I disagree with Cleveland's conclusion that the *Insular Cases* relegated the unincorporated territories to a largely extraconstitutional zone, her analysis of the relevant jurisprudence (and the issues at stake) is exceptionally thorough and insightful.

13 For the sake of conciseness, I use the phrase "political status" in this Article, although the status issue in Puerto Rico and other U.S. territories also has constitutional, legal, social, cultural, economic, and additional dimensions.

provisions applied. To the contrary, incorporated and unincorporated territories were much more similar in this respect than scholars have argued; and whether a place was within or outside the narrowly defined "United States" rarely determined whether a given constitutional provision applied there.

With respect to the effect of the *Insular Cases* on the political status of the unincorporated territories, the standard account has overlooked the most important consequence of the doctrine of territorial incorporation. While it is true that the *Insular Cases* rejected the assumption that all U.S. territories were on their way to statehood, the unprecedented implication of this reasoning was not that Congress could withhold statehood indefinitely from an unincorporated territory—after all, Congress could withhold statehood indefinitely from an incorporated territory, too—but rather that the United States could relinquish sovereignty over an unincorporated territory altogether. The *Insular Cases* established that such territories could be separated from the United States, or what I call here "deannexed,"[14] as long as they remained unincorporated. Preserving the option of deannexation was precisely the reason not to incorporate a territory in the first place.

The *Insular Cases*, in other words, stood for the proposition that the acquisition of a territory by the United States could be followed by its separation from the United States: the doctrine of territorial incorporation thus amounted to a constitutional doctrine of territorial deannexation. That the United States could annex territory was beyond question by 1898; that such territory had a different constitutional status from that of the states of the Union was not news; that Congress could postpone statehood indefinitely would have surprised no one; that Congress enjoyed substantial flexibility in governing the territories, through what was known as its "plenary power," was also well established. What turned out to be unclear, though, was whether territory, once annexed, could be deannexed. Could the United States contract as well as expand?

Although this Article, which stays close to the relevant case law, functions more as a doctrinal analysis than as a properly historical argument, I am equally interested in the broader historical problems that this investigation brings to light. If the *Insular Cases* must be understood as authorizing the deannexation of U.S. territory, then it is polemical, but by no means preposterous, to see these cases as setting forth nothing less than a constitutional theory of secession (albeit of a peculiar kind). Giving tooth to this claim would demand engagement

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[14] On the term "deannexation," see note 6.

with recent historical scholarship working to situate the United States' imperial experiment with respect to the racial, social, political, and constitutional crises of the Civil War and its aftermath.[15] As this scholarship recognizes, the debate over imperialism unfolded at a time when the trauma of southern secession, civil conflict, and Reconstruction remained vivid memories for many Americans. No sooner had the people of the United States managed to put the pieces of a shattered nation back together in a tense and fragile peace than a vocal constituency began to embrace an ambitious vision of overseas imperialism.[16] But cautious voices warned of the dangers of renewed "irrepressible conflicts" that might well follow in the wake of incautious global expansion.[17] If the United States conquered territories worldwide, but their colonial subjects resisted, could Americans simply walk away from their so-called possessions? States could never leave the Union—that much was settled.[18] But what about the territories? Could they be separated from the United States? Confirming that annexation did not preclude deannexation, the *Insular Cases* facilitated the extension of empire by ensuring a means of imperial retreat. That such a doctrine emerged out of residual preoccupations with the problem of national unity—and, moreover, that this same doctrine informs today's debate over the future of the unincorporated territories, such as Puerto Rico, where a right to independence has long been asserted, if never actually embraced by a majority—will usefully be borne in mind as the argument of this Article unfolds, even by readers who balk at the notion that a secessionist doctrine lies at the heart of the constitutional jurisprudence of American expansion.

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15 See, for example, David W. Blight, *Race and Reunion: The Civil War in American Memory* 351–54 (Belknap 2001). See also Amy Kaplan, *The Anarchy of Empire in the Making of U.S. Culture* 1–12 (Harvard 2002), where Kaplan, a literary scholar and cultural historian, offers an elegant reading of *Downes*. While she focuses less on the details of the different opinions, and more on the broader "cultural connotations" of the decision, id at 3, she observes (rightly, in my view) that the language of the decision reflected lingering Civil War memories, and keenly notes the pervasive preoccupation with "dismemberment" of the national "body." See id at 8–9.

16 See, for example, Walter LaFeber, *The New Empire: An Interpretation of American Expansion, 1860–1898* 1–10 (Cornell 1963) (tracing the beginnings of American imperialism to the 1860s, and characterizing the events of 1898 as the culmination of, rather than a break with, these earlier instances of imperialist expansionism).

17 See H. Teichmueller, *Expansion and the Constitution*, 33 Am L Rev 202, 212 (1899) ("The government, backed by large military power, may then be controlled by organized capital, and future 'irrepressible conflicts' may be in store for us before the people regain supremacy."). The other warnings that I am aware of were somewhat more veiled. See Part III.B. See generally Burnett, *The Constitution and Deconstitution of the United States* (cited in note 1), where I offer a more detailed account of the contributors to the debate over imperialism who discussed the problem of deannexation.

18 See *Texas v White*, 74 US (7 Wall) 700, 725 (1869) (describing the United States as "an indestructible Union, composed of indestructible States").

I divide my argument into four Parts. In Part I, I describe the traditional account of the *Insular Cases* in greater detail; in Part II, I outline the problems with this account. Part II begins with a discussion of the Court's nineteenth-century jurisprudence on the Constitution in the territories, and continues with an analysis of the *Insular Cases* in light of these precedents. Here I demonstrate that, far from carving out a largely "extraconstitutional zone" for the unincorporated territories, the *Insular Cases* simply perpetuated, with slight modification, an already ambiguous jurisprudence on the applicability of constitutional provisions in the territories of the United States. The traditional interpretation of the *Insular Cases*—that they distinguished between places where the "entire" Constitution applied, and places where only its "fundamental" protections applied—simply does not reflect the doctrinal content of these decisions.

The argument I develop in Part II raises the question of what purpose the distinction between incorporated and unincorporated territories served, if not (as scholars have long asserted) to establish that the Constitution applied in its entirety in incorporated territories and only minimally in unincorporated territories. In Part III, I answer this question, arguing that the most significant consequence of the distinction between incorporated and unincorporated territories was one that has not previously been attributed to the *Insular Cases*: namely, the creation of a category of domestic territory not bound in permanent union to the rest of the United States. These decisions made clear that the United States retained the power to deannex territory, as long as it remained unincorporated—even after it had become subject to exclusive U.S. sovereignty, even after Congress had begun to govern it under the Territory Clause of the Constitution,[19] and even (it later turned out) after its inhabitants had been made U.S. citizens.[20] Two of the *Insular Cases*, *Downes v Bidwell*[21] and *De Lima v Bidwell*,[22] contain evidence, thus far overlooked in the scholarship, in support of a deannexationist interpretation of the doctrine of territorial incorporation. Moreover, a review of the contemporary legal debate leading up to the *Insular Cases* reveals additional evidence in support of this revisionist interpretation: this debate shows that doubts

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19 US Const Art IV, § 3, cl 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

20 See *Balzac*, 258 US at 313 (holding that a congressional grant of citizenship to Puerto Ricans in 1917 had not "incorporated" the territory). See generally José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans* (Yale 1979).

21 182 US 244 (1901).

22 182 US 1 (1901).

existed at the time over whether it would be constitutionally possible for the United States to relinquish territory once it had been ceded to the United States in a treaty of peace. The *Insular Cases*, I show, resolved those doubts, with a constitutional doctrine of territorial deannexation.

Finally, in Part IV, I explain how this important yet long-overlooked consequence of the *Insular Cases* sheds light on, and could help resolve, the ongoing debate over the political status of Puerto Rico, the United States' largest remaining unincorporated territory—a debate in which the ever-imminent possibility of separation from the United States plays a crucial, but misunderstood, role.[23]

I. THE TRADITIONAL ACCOUNT OF THE *INSULAR CASES*

> [W]e are taking a long step toward qualifying ourselves to discuss the popular question which has lately agitated the minds of so many worthy people[,] whether "the Constitution of the United States follows the flag of the United States"—in other words, whether the Constitution is endowed with feet with which to walk or wings with which to fly, and whether . . . it goes to and fro in the world enforcing itself beneficently upon those populations with which in its wanderings it comes in contact.[24]

In 1898, the United States acquired sovereignty over the Spanish colonies of the Philippines, Puerto Rico, and Guam. An easy victory in

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23 It is controversial today to use the phrase "unincorporated territory," or even the word "territory," to refer to Puerto Rico, as well as to the Commonwealth of the Northern Mariana Islands (the CNMI), since these terms are taken to evoke a phase of formal colonial rule that supposedly ended for Puerto Rico in 1952, when the island became the "Commonwealth of Puerto Rico," see Joint Resolution Approving the Constitution of the Commonwealth of Puerto Rico, Pub L No 447-567, 66 Stat 327 (1952), and for the Marianas in 1976, when they became the "Commonwealth of the Northern Mariana Islands," see Joint Resolution to Approve the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America," Pub L No 94-241, 90 Stat 263 (1976), codified at 48 USC § 1801 (2000). On these transitions to commonwealth status, see Trías Monge, *Puerto Rico* ch 10 at 107–18 (cited in note 5) (Puerto Rico); Leibowitz, *Defining Status* at 526–36 (cited in note 11) (CNMI). However, in my view, these objections rest on misunderstandings of the significance of the words "unincorporated" and "territory."

I use the phrase "unincorporated territory" to refer to the five places with respect to which Congress exercises its powers (whatever their breadth and scope) pursuant, at least in part, to the Territory Clause: the term "territory" refers to this constitutional source of congressional power to legislate; the term "unincorporated" means nothing other than that Congress has not expressly "incorporated" these places into the United States. Thus understood, the unincorporated territories are Puerto Rico, the CNMI, the U.S. Virgin Islands, Guam, and American Samoa.

24 Eugene Stevenson, *The Relation of the Nation to Its Dependencies*, 36 Am L Rev 366, 375 (1902).

the Spanish-American War provided the occasion; in the Treaty of Paris, ratified on April 11, 1899, Spain ceded Puerto Rico and Guam, sold the Philippines for $20 million, and relinquished all claims to sovereignty over Cuba.[25] American officials had proclaimed their principal aim in entering the conflict as that of helping Cuba secure its independence from Spain,[26] and the explosion of the USS *Maine* in the Havana harbor had served as the immediate trigger for a declaration of war.[27] However, the temptations of possession soon overtook the ideals of liberation and the instincts of retaliation: the United States retained authority over Cuba temporarily, and over the other islands indefinitely.[28]

The claim of American sovereignty over these new territories intensified a debate that was already raging between imperialists and anti-imperialists over whether the United States could, consistent with its Constitution, embark on a quest of global expansion and create a colonial empire to rival those then being amassed by European powers.[29] The reelection of President William McKinley in 1900 gave the popular and political victories to the imperialist camp.[30]

With the *Insular Cases* of 1901, the imperialists won a legal victory as well. In those cases, the Fuller Court[31] addressed the controversial question—unresolved by McKinley's election—of precisely how to characterize the constitutional status of the territories ceded by Spain to the United States at the end of the war. In the most important of these cases, *Downes*, a concurring opinion by Justice Edward

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25 See Treaty of Paris, 30 Stat at 1755–56 (Arts I–III).

26 See Teller Amendment, 30 Stat 738.

27 On the role of the *Maine* in the historiography of the Spanish-American War, see Louis A. Pérez, Jr., *The War of 1898: The United States and Cuba in History and Historiography* 58–64 (North Carolina 1998).

28 See Treaty of Paris at 1755–56 (Arts I–III). See generally Burnett and Marshall, eds, *Foreign in a Domestic Sense* (cited in note 2).

29 See, for example, Blight, *Race and Reunion* at 351–54 (cited in note 15); Kristin L. Hoganson, *Fighting for American Manhood: How Gender Politics Provoked the Spanish-American and Philippine-American Wars* 133–43 (Yale 1998); Fiss, *Troubled Beginnings of the Modern State* 226 (cited in note 6); Robert L. Beisner, *Twelve Against Empire: The Anti-Imperialists, 1898–1900* xxii (Chicago 2d ed 1985).

30 On whether imperialism was actually a decisive issue for voters in the 1900 election, see Thomas A. Bailey, *Was the Presidential Election of 1900 a Mandate on Imperialism?*, 24 Miss Valley Hist Rev 43, 45–51 (1937). Regardless of imperialism's role in the election, with McKinley's victory the defenders of an imperialist policy prevailed.

31 The Fuller Court included Chief Justice Melville Weston Fuller, and Justices Horace Gray, David J. Brewer, Henry Billings Brown, John Marshall Harlan, George Shiras, Jr., Edward Douglass White, Rufus W. Peckham, and Joseph McKenna. Fiss describes backroom maneuverings on the Court and situates the *Insular Cases* within the broader context of the jurisprudence of the Fuller Court. See Fiss, *Troubled Beginnings of the Modern State* ch 8 at 225–56 (cited in note 6).

Douglass White set forth the doctrine of territorial incorporation.[32] According to Justice White, some territories subject to U.S. sovereignty had been incorporated into the United States, and therefore they formed an integral part of the United States. Others, in contrast, had been annexed by the United States but not incorporated into it: they merely belonged to the United States or, as White put it, were "appurtenant thereto" as "possessions."[33] White described the latter as "foreign to the United States in a domestic sense."[34] Eventually, they acquired the inelegant label of "unincorporated territories."[35]

The assertion that the new territories belonged to the United States but were not a part of it certainly sounds "imperialist"—but what, constitutionally, did it mean? The *Downes* case arose out of a dispute over duties charged on a shipment of oranges from Puerto Rico to New York under the Foraker Act,[36] an organic act passed by Congress in 1900 to establish a civil government on the island. The plaintiffs argued that the duty, which applied specifically to goods from Puerto Rico, violated the Uniformity Clause of the Constitution, which provides that all "Duties, Imposts and Excises shall be uniform *throughout the United States*."[37] But the reasoning—that Puerto Rico

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32 182 US at 287–344 (White concurring).

33 Id at 342. The idea that territory could be "appurtenant" to the United States had precedent in the acquisition of guano islands in the mid-nineteenth century. The Guano Islands Act of 1856, which authorized the United States to take possession of guano islands under certain circumstances, described them as "appertaining" to the United States. See 11 Stat 119 (1856), codified at 48 USC § 1411 (2000).

34 *Downes*, 182 US at 341 (White concurring).

35 The distinction between incorporated and unincorporated territories is not the same as that between organized and unorganized territories; the latter categories refer to whether Congress has established a civil government in a territory via an organic act. See, for example, Laughlin, *Law of United States Territories* § 8:4 at 137–39 (cited in note 2) (explaining how the distinction between "organized" and "unorganized" territory has been blurred in American Samoa).

36 31 Stat 77 (1900), codified as amended at 48 USC § 731 et seq (2000). The disputed provision stated:

> That on and after the passage of this Act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries.

37 US Const Art I, § 8, cl 1 (emphasis added). The plaintiffs also based their challenge on the Export Clause, Art I, § 9, cl 5 ("No tax or duty shall be laid on Articles exported from any State."), and the Preference Clause, Art I, § 9, cl 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another."). Justice White began his concurrence by explaining that the latter two clauses raised the same questions as the Uniformity Clause and need not be considered separately. *Downes*, 182 US at 288 (White concurring). The point is arguable, since the Export and Preference Clauses do not use the phrase "United States," whereas the Uniformity Clause does. But there was a good reason not to address these arguments separately: namely, that *Downes* involved exports from Puerto Rico, not

was not a part of the "United States," though subject to its sovereignty—led to the conclusion that Congress could disregard the requirement of uniformity when legislating for Puerto Rico.[38]

This meant, it has been argued ever since, that the Constitution applied in full within the boundaries of the United States proper, including the incorporated territories, while only its fundamental provisions applied in the unincorporated territories. As one contemporary commentator explained, "The plain lesson of [the *Insular Cases*] is that the Constitution applies to ceded territory which has been incorporated into the United States, but it does not apply to territory which has been annexed but not incorporated into the Union, unless taken there by congressional action."[39] A more recent account summarizes the doctrine thus: "According to [the *Insular Cases*], Puerto Rico is unincorporated territory and, therefore, not all the provisions of the Constitution are applicable, either to the Congress, or to the government of Puerto Rico. In contrast, the entire Constitution applies to incorporated territories."[40]

In support of this interpretation, scholars have pointed to language in Justice White's concurrence indicating that only certain "fundamental" rights were protected everywhere.[41] For instance, White

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from a state, whereas the Export Clause refers to exports from a state and the Preference Clause refers to commerce between states. A subsequent case in the *Insular Cases* group dealt with the Export Clause; that case involved exports from New York to Puerto Rico. See *Dooley v United States*, 183 US 151, 153, 157 (1901) ("*Dooley II*"). See Part II.B.3.

38 *Downes*, 182 US at 286–87.

39 David K. Watson, *Acquisition and Government of National Domain*, 41 Am L Rev 239, 253 (1907). Watson elaborated as follows:

> Foreign territory acquired by the United States is subject to two classifications: First, territory which is incorporated into the United States. This is subject to the provisions of the Constitution, and its people are entitled to its benefits, including the Bill of Rights, commonly known as the first ten amendments. Second: territory which is not incorporated into the United States, but which may be regarded as outlying territory. This is subject to be governed by Congress under the powers granted by the Constitution applicable to such territory, not necessarily including all the provisions of the Bill of Rights, but subject to such limitations upon Congressional action as inhere in the "prohibitions" of the Constitution.

Id at 254.

40 David M. Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, 110 FRD 452, 454 (1986). This claim is so ubiquitous in the scholarship on these cases that a comprehensive list of examples would take up too much space. See, for example, Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 Asian-Pac L & Policy J 180, 207 n 87 (2003); Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 Asian-Pac L & Policy J 69, 79–80 (2001); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U Hawaii L Rev 445, 449 (1992); Robert A. Katz, Comment, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U Chi L Rev 779, 781–82 (1992).

41 See, for example, Cleveland, 81 Tex L Rev at 224 (cited in note 3); Hall, 2 Asian-Pac L & Policy J at 80, 92–93 (cited in note 40); Rivera Ramos, 65 Revista Jurídica Universidad Puerto

wrote that "in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."[42] Additional evidence came from a vigorous dissent in *Downes*, in which Justice John Marshall Harlan lamented the majority's decision to authorize a "theory of government outside of the supreme law of the land."[43] In short, the *Insular Cases* were immediately denounced, and have since been roundly condemned, for "justifying the extra-constitutional rule of America's colonies."[44]

Between 1901 and 1922, the Court handed down a series of additional decisions that came to be situated within the rubric of the *Insular Cases*.[45] Different scholars include different cases under this label: the most comprehensive lists usually consist of the nine decisions handed down in 1901 (including *Downes*)[46] and an additional fourteen decisions handed down through 1922.[47] Several of these cases went on to hold federal grand jury and jury trial rights inapplicable in unincorporated territories: in *Hawaii v Mankichi*,[48] the Court held constitutional provisions relating to juries inapplicable in Hawaii after its an-

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Rico at 294–95 (cited in note 2); Van Dyke, 14 U Hawaii L Rev at 459 (cited in note 40); Katz, Comment, 59 U Chi L Rev at 782–83 (cited in note 40).

42 *Downes*, 182 US at 291 (White concurring). Justice Brown, who wrote the opinion for the Court (which no other justice joined), also distinguished between "natural" and "artificial" rights, reasoning that only the former apply everywhere. See id at 282.

43 Id at 382 (Harlan dissenting). Fuller also wrote a dissent in *Downes* (joined by Harlan, Brewer, and Peckham), and he too expressed dismay at White's novel and troubling doctrine. See id at 373.

44 Beisner, *Twelve Against Empire* at 162 (cited in note 29) (noting that, for example, Senator George F. Hoar "sharply criticized the Supreme Court's 'Insular Decisions' justifying the extraconstitutional rule of America's colonies").

45 The cases are also referred to as the "*Insular Tariff Cases*." See, for example, Gary Lawson and Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 Nw U L Rev 581, 618 n 136 (2001) (attributing the collective designation of the decision as "*Insular Tariff Cases*" to *De Lima*). In 1901, the federal government published a compilation of materials from the first several cases, and referred to them as the *Insular Cases*. See Howe, ed, *The Insular Cases* (cited in note 1).

46 *De Lima*, 182 US 1; *Goetze v United States*, 182 US 221 (1901); *Crossman v United States*, 182 US 221 (1901); *Dooley v United States*, 182 US 222 (1901) ("*Dooley I*"); *Armstrong v United States*, 182 US 243 (1901); *Downes*, 182 US 244; *Huus v New York and Porto Rico Steamship Co*, 182 US 392 (1901); *Dooley II*, 183 US 151; and *Fourteen Diamond Rings v United States*, 183 US 176 (1901). The cases of *Goetze* and *Crossman* were decided together.

47 *Hawaii v Mankichi*, 190 US 197 (1903); *Gonzales v Williams*, 192 US 1 (1904); *Kepner v United States*, 195 US 100 (1904); *Dorr v United States*, 195 US 138 (1904); *Mendezona v United States*, 195 US 158 (1904); *Rassmussen v United States*, 197 US 516 (1905); *Trono v United States*, 199 US 521 (1905); *Grafton v United States*, 206 US 333 (1907); *Kent v Porto Rico*, 207 US 113 (1907); *Kopel v Bingham*, 211 US 468 (1909); *Dowdell v United States*, 221 US 325 (1911); *Ochoa v Hernandez*, 230 US 139 (1913); *Ocampo v United States*, 234 US 91 (1914); and *Balzac v Porto Rico*, 258 US 298 (1922).

48 190 US 197 (1903).

nexation but prior to its incorporation;[49] in *Rassmussen v United States*,[50] the Court held, in contrast, that grand jury and jury trial rights were applicable in Alaska because Alaska was an incorporated territory.[51] In *Dorr v United States*,[52] the Court held that a grand jury indictment was not constitutionally required in the Philippines,[53] and a majority of the Court embraced Justice White's doctrine of territorial incorporation (which had been endorsed by only two other justices in *Downes*). And in the 1922 decision in *Balzac v Porto Rico*,[54] a unanimous Court confirmed that jury trial rights were inapplicable in Puerto Rico in an opinion by Chief Justice William Howard Taft relying on Justice White's doctrine of territorial incorporation.[55]

The Court did not discuss the doctrine again until the late 1950s, when it considered two challenges brought by civilians prosecuted but denied jury trials for murders committed on American military bases overseas,. In *Reid v Covert*,[56] the Court overturned the challenged convictions, holding that the civilian defendants had the right to be tried by juries because they were U.S. citizens, though the crimes they were accused of had been committed outside the boundaries of the United States.[57] Although these cases concerned U.S. military bases in foreign countries rather than domestic territories, Justice Hugo Black's opinion for the Court (joined by a plurality of the justices) expressly called into question the doctrine of the *Insular Cases*.[58] Although Justice Black expressed his desire to see the *Insular Cases* overruled, he fell short of the votes to do so.[59] In any event, he also distinguished the

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49 Id at 217–18. Brown again wrote for the Court, and did not rely on the doctrine of territorial incorporation. Id at 209–10. But White again concurred, id at 218–21, and again argued that his own doctrine offered a better rationale for the holding. Id at 219.

50 197 US 516 (1905).

51 Id at 525.

52 195 US 138 (1904).

53 Id at 149.

54 258 US 298 (1922).

55 Id at 305 ("[T]he opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court.").

56 354 US 1 (1957) (plurality) (reversing, on rehearing, the decisions in *Reid v Covert*, 351 US 487 (1956), and *Kinsella v Krueger*, 351 US 470 (1956)).

57 354 US at 40–41.

58 Id at 12–14. As Justice Black explained, the Court had relied upon the *Insular Cases* in the 1956 decisions "to support its conclusion that Article III and the Fifth and Sixth Amendments were not applicable" to the earlier trials at issue in the first *Reid* and *Kinsella*. Id at 12.

59 Chief Justice Earl Warren and Justices William O. Douglas and William Brennan joined Black's plurality opinion. Id at 14:

> Moreover, it is our judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.

cases before him from the *Insular Cases* by reasoning in part that the Constitution must protect the defendants because they were American citizens—a shaky basis for a distinction, since by then Puerto Ricans had been American citizens for forty years,[60] and yet, as Black himself complained, the *Insular Cases* remained valid law there. In their concurring opinions, both Justice Felix Frankfurter and the second Justice John Marshall Harlan emphasized the continuing validity of the *Insular Cases*.[61]

Since *Reid*, the Supreme Court and lower courts have continued to cite the *Insular Cases* in case-by-case analyses of which constitutional provisions apply in which unincorporated territories.[62] Most of these decisions have held the constitutional provisions in question applicable: for instance, the courts have held that the First Amendment protects freedom of speech in the unincorporated territories,[63] and that the protection against unreasonable searches and seizures,[64] the guarantees of due process and equal protection,[65] and the rights of privacy and travel[66] apply in these territories. At the same time, a number of these decisions declined to identify the precise source of these

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60 See note 20.

61 *Reid*, 354 US at 53–64 (Frankfurter concurring); id at 67, 74–75 (Harlan concurring). Justices Frankfurter and Harlan concurred separately and disagreed with Black's comments on the *Insular Cases*. See id at 50–54 (Frankfurter concurring) (noting that the *Insular Cases* have an instructive role to play); id at 67 (Harlan concurring) ("I believe that [the *Insular Cases*], properly understood, still have vitality, and that, for reasons suggested later, which differ from those given in our prior opinions, they have an important bearing on the question now before us.").

62 The unincorporated territories now number five: Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa. On the "unincorporated territory" label, see note 23. For introductions to the history and legal status of twentieth-century U.S. territories, see generally Leibowitz, *Defining Status* (cited in note 11). The case-by-case analysis has involved not only determining whether certain constitutional provisions apply in these territories but also whether certain federal laws apply, an inquiry that generally depends on whether the language of the given statute includes the territory in question. See, for example, Helfeld, 110 FRD at 452–53 (cited in note 40).

63 See, for example, *El Vocero de Puerto Rico v Puerto Rico*, 508 US 147, 148 n 1 (1993) (noting that the First Amendment Free Speech Clause "fully applies to Puerto Rico"); *Posadas de Puerto Rico Associates v Tourism Co of Puerto Rico*, 478 US 328, 331 n 1 (1986) (same). The Court in *Balzac* had already assumed that First Amendment free speech protections applied to Puerto Rico. 258 US at 314.

64 See, for example, *Torres v Puerto Rico*, 442 US 465, 470 (1979) (holding that Fourth Amendment protections against unreasonable searches and seizures are applicable against the Puerto Rican government).

65 See, for example, *Examining Board of Engineers, Architects and Surveyors v Flores de Otero*, 426 US 572, 600 (1976) (holding that both equal protection and due process guarantees are applicable against the Puerto Rico government).

66 See, for example, *Montalvo v Colon*, 377 F Supp 1332, 1341–42 (D PR 1974) (holding that *Roe v Wade* applies with the same force in Puerto Rico as in a state); *Califano v Torres*, 435 US 1, 4 n 6 (1978) (per curiam) ("For purposes of this opinion we may assume that there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union.").

rights: with respect to Puerto Rico, for instance, courts have held that the protection against unreasonable searches and seizures applies *either* through the Fourth *or* through the Fourteenth Amendment;[67] that due process and equal protection guarantees apply *either* through the Fifth *or* through the Fourteenth Amendment;[68] and that privacy rights apply *either* because they are fundamental, *or* because Puerto Rico is "like a state" for purposes of the Fourteenth Amendment, *or* (as one district court concluded) because "perhaps" the Bill of Rights applies in Puerto Rico in full after all.[69] Lower courts have cited the *Insular Cases* in decisions holding the right to a jury trial inapplicable in the Commonwealth of the Northern Mariana Islands;[70] although the right to trial by jury was held applicable in American Samoa, the relevant decision also relied on the *Insular Cases*, reaching its conclusion through an analysis that the court characterized as appropriate for unincorporated territories only.[71] In addition, courts have turned to the *Insular Cases* and their doctrine to uphold race-based restrictions on the alienation of land in both the CNMI and American Samoa,[72] and race-based restrictions on employment in American Samoa.[73]

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67 *Torres*, 442 US at 471 ("We conclude that the constitutional requirements of the Fourth Amendment apply to the Commonwealth . . . [but] have no occasion to determine whether the Fourth Amendment applies to Puerto Rico directly or by operation of the Fourteenth Amendment.").

68 *Examining Board*, 426 US at 601 ("The Court, however, thus far has declined to say whether it is the Fifth Amendment or the Fourteenth which provides the protection."); *Calero-Toledo v Pearson Yacht Leasing Co*, 416 US 663, 668 n 5 (1974) (same).

69 *Montalvo*, 377 F Supp at 1342. The district court in this case made an observation consistent with the argument of this Article: contrary to the prevailing consensus that the *Insular Cases* withheld the protection of the Constitution from the unincorporated territories, they did not actually hold inapplicable any constitutional provisions other than the Fifth Amendment grand jury requirement and the Sixth Amendment jury trial guarantee. See id at 1338. I go slightly further in the discussion in Part II.B.4, and argue that even these right-to-jury holdings were somewhat more limited than has been recognized.

70 See, for example, *Northern Mariana Islands v Atalig*, 723 F2d 682, 688–89 (9th Cir 1984).

71 See *King v Andrus*, 452 F Supp 11, 17 (D DC 1977). The analysis in question considered whether it would be "impractical and anomalous" to apply the right to a jury trial in American Samoa and concluded that it would not be. Id. Based on that reasoning, the D.C. District Court held that the constitutional right to a trial by jury applies in American Samoa. Id. Justice Harlan first articulated the "impractical and anomalous" standard in his concurrence in *Reid*. 354 US at 75–76 (Harlan concurring). For a discussion (and endorsement, under certain circumstances) of the "impractical and anomalous" analysis, see Katz, Comment, 59 U Chi L Rev at 783–84 (cited in note 40).

72 See *Wabol v Villacrusis*, 908 F2d 411, 421–24 (9th Cir 1990), amended and superseded by 958 F2d 1450, 1459–62 (9th Cir 1992) (upholding race-based restrictions on land alienation in the CNMI); *Craddick v Territorial Registrar of American Samoa*, 1 Am Samoa 2d 10, 12 (1980) (upholding such restrictions in American Samoa).

73 See *Banks v American Samoa*, 4 Am Samoa 2d 113, 124–28 (1987) (upholding race-based employment discrimination in American Samoa). See also Hall, 2 Asian-Pac L & Policy J at 85–87 (cited in note 40) (discussing some of these cases); Laughlin, *Law of United States Territories* § 10:10 at 172–81, § 17:6 at 305–10 (cited in note 2) (same).

Moreover, courts have continued to cite the *Insular Cases* for the general proposition that Congress has "plenary power" to govern the unincorporated territories under the Territory Clause of the Constitution.[74] Courts have relied on this reasoning to uphold Congress's differential treatment of unincorporated territories in a number of arenas, for instance upholding the exclusion of Puerto Rico from full participation in certain federal programs,[75] and holding the one-person, one-vote principle inapplicable in the CNMI.[76] In addition, the repercussions of the *Insular Cases* continue beyond the boundaries of domestic territory. For example, in *United States v Verdugo-Urquidez*,[77] the Court cited the *Insular Cases* in support of its holding that the Fourth Amendment's prohibition against unreasonable searches and seizures did not extend beyond the boundaries of the United States, in the context of a search by American officials of a home in Mexico belonging to a Mexican national who was being held in the United States for prosecution in federal court.[78]

In sum, the *Insular Cases* continue to be cited as good law, and courts continue to rely upon them in support of the proposition that not only unincorporated territories, but also other places subject to U.S. sovereignty but outside the boundaries of a narrowly defined "United States," have a different—and subordinate—constitutional status.

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74 See, for example, *Harris v Rosario*, 446 US 651, 651–52 (1980); *Califano*, 435 US at 5. These decisions did not use the phrase "plenary power," but upheld Congress's discretion to discriminate against Puerto Rico in allocating funds for federal welfare programs. The former decision cited the Territory Clause specifically, see *Harris*, 446 US at 651–52, while the latter simply noted that the definition of the "United States" in the relevant statute included only the fifty states and the District of Columbia, see *Califano*, 435 US at 2.

75 *Harris* upheld the lower level of Aid to Families with Dependent Children reimbursement in Puerto Rico, see 446 US at 652; *Califano* upheld the exclusion of Puerto Rico from the Supplemental Security Income program under the Social Security Administration, see 435 US at 4–5.

76 See *Rayphand v Sablan*, 95 F Supp 2d 1133, 1138–40 (D NMI 1999) (citing the *Insular Cases* in upholding the apportionment of equal numbers of senators in the CNMI Senate to each of the territory's three islands despite their significantly different populations).

77 494 US 259 (1990).

78 Id at 268–69. On the relationship between the *Insular Cases*, *Reid*, and *Verdugo-Urquidez*, see Cleveland, 81 Tex L Rev at 245–47 (cited in note 3); Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 105–08 (Princeton 1996). See also Kal Raustiala, *The Geography of Justice*, 73 Fordham L Rev 2501, 2520–27 (2005) (situating the *Insular Cases*, *Reid*, and *Verdugo-Urquidez* in a line of cases concerning the relationship between territory and the Constitution).

II. REVISING THE TRADITIONAL ACCOUNT

> So broad indeed is the Constitution . . . that, should it ever become practicable and desirable to annex one of the planets, we submit that no amendment to the Constitution would be necessary to authorize such acquisition, or to empower Congress to establish a government for it.[79]

Several authors have suggested that a connection exists between the plenary power doctrine and the doctrine of territorial incorporation set forth in the *Insular Cases*.[80] For instance, Efrén Rivera Ramos has explained:

> By mid-1904 . . . the doctrine of the differentiated status of the newly acquired territories and of the plenary power of Congress to govern them had been established. The colonial condition of the territories and their peoples—totally subordinated and subject to the mercy of Congress and, in many ways, of the federal Executive—had been given sanction by the highest court of the land.[81]

However, although a connection between the doctrines of plenary power and territorial incorporation does exist, as I discuss in detail in this Part, it is important to recall that the plenary power doctrine did not originate in the *Insular Cases*—a point that often gets lost in critiques of these decisions. Although they reaffirmed the plenary power doctrine, the *Insular Cases* did not invent it, nor were the unincorporated territories the first regions under U.S. sovereignty to be subject to it. Instead, as Sarah H. Cleveland and others have demonstrated, the plenary power doctrine originated early in the nineteenth century and developed in parallel jurisprudential lines, affecting not

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79 Frank J.R. Mitchell, *The Legal Effect of the Acquisition of the Philippine Islands*, 48 Am L Reg 193, 198 (1900).

80 See, for example, Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 Cath U L Rev 1115, 1139 (2002) ("The territories occupied by the United States that have not been incorporated have been subjected to the plenary power doctrine."); Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations* Circa *the Spanish American War, 1896–1900*, 78 Denver U L Rev 921, 935 (2001) ("[A]s 'unincorporated territories,' the insular territories are subject to the plenary power of Congress."); Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 John Marshall L Rev 55, 92 (1997) ("Puerto Rico, as an unincorporated territory, remains under the plenary power of Congress."); Van Dyke, 14 U Hawaii L Rev at 459 (cited in note 41) ("The full effect of the *Insular Cases* was thus to declare that (1) Congress has general and plenary power over the territories (which it can delegate to executive agencies), but that (2) these powers are limited by certain fundamental rights of the territorial inhabitants.").

81 Rivera Ramos, 65 Revista Jurídica Universidad Puerto Rico at 257 (cited in note 2).

only the territories, but also Native Americans, aliens, and even foreign affairs.[82]

Nevertheless, these commentators see the *Insular Cases* as a break: although the roots of the plenary power doctrine may be found much earlier, Cleveland and others argue that these turn-of-the-century cases dramatically expanded the scope of congressional power in the unincorporated territories. By carving out an "extraconstitutional zone" for the unincorporated territories, and thereby releasing the federal government from nearly every constitutional restraint in legislating there, the *Insular Cases* vastly increased federal authority over them; or so the argument goes.[83] This view is well represented in the literature on these cases, even among those who (like Cleveland) understand and expressly recognize that the doctrine of plenary power over territories long preceded the doctrine of territorial incorporation.[84]

In this Part, I demonstrate the inadequacy of this widely accepted understanding of the consequences of the *Insular Cases*. These decisions, I argue, did not break with precedent by releasing the federal government from most, if not all, constitutional restraints in the unincorporated territories. Instead, these decisions simply perpetuated,

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82 See, for example, Cleveland, 81 Tex L Rev at 8–15 (cited in note 3). See also Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* 119–45 (North Carolina 2002) (describing the evolution of the plenary power doctrine through the federal government's efforts to assert control over the Mormons in the territory of Utah in the nineteenth century).

83 See Cleveland, 81 Tex L Rev at 207–39 (cited in note 3). Specifically, Cleveland argues that a consensus emerged on the Court after the Civil War to the effect that the Constitution applied of its own force in the territories, that this consensus again began to erode toward the end of the nineteenth century, and that it was finally destroyed by the *Insular Cases*. See id at 197–239.

84 See, for example, Natsu Taylor Saito, *Will Force Trump Legality After September 11?: American Jurisprudence Confronts the Rule of Law*, 17 Georgetown Immig L J 1, 50–51 (2002) (noting the prior existence of the plenary power doctrine in other contexts, but then attributing its application in the territorial context to the *Insular Cases*); Rivera Ramos, 65 Revista Jurídica Universidad Puerto Rico at 279 (cited in note 2) (describing the most important decisions in the *Insular Cases* as the "foundation" of the doctrine of congressional plenary power over territories). The Court referred to the grant of power in the Territory Clause as "plenary" as early as 1831. See *Cherokee Nation v Georgia*, 30 US (5 Pet) 1, 43 (1831) ("The second clause of the third section of the fourth article of the constitution is equally convincing. . . . The power given in this clause is of the most plenary kind."). See also *Late Corporation of Church of Jesus Christ of Latter-Day Saints v United States*, 136 US 1, 42 (1890):

> The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States.

Even earlier, the Court described Congress's power over the territories in broad terms, though without using the term "plenary." See Part II.A.

with slight modifications, an already ambiguous jurisprudence on the role of constitutional provisions in the territories. The contribution of the *Insular Cases* to this aspect of the Court's jurisprudence consisted of little more than a new rationale for accomplishing what the well-established doctrine of congressional plenary power over territories had already justified: the exemption of Congress from certain constitutional restraints when legislating for the territories of the United States. The *Insular Cases* confirmed Congress's plenary power over territories, and moderately expanded it; but the result, as far as the applicability of the Constitution was concerned, was nothing like an extraconstitutional zone.

I develop this argument in two Parts. In Part II.A, I examine the Court's nineteenth-century jurisprudence on the Constitution in the territories, showing that, even prior to 1901, it was not at all clear that a number of constitutional provisions applied of their own force, or *ex proprio vigore*, in the territories. In Part II.B, I discuss the *Insular Cases* in light of these precedents and demonstrate that these turn-of-the-century decisions actually added little to the existing jurisprudence on the applicability of constitutional provisions in the territories. I show that the distinction between incorporated and unincorporated territories introduced in the *Insular Cases* did not mirror a distinction between those places in which the "entire" Constitution applied and those in which only its "fundamental" provisions applied. In fact, on closer examination it turns out that every constitutional provision held inapplicable in the unincorporated territories was also inapplicable somewhere within the boundaries of the "United States" proper: either in an incorporated territory, or in the states themselves. Contrary to the standard account, then, whether a place was within or outside the "United States" did not reliably determine whether a constitutional provision applied there.[85]

A. The Constitution and Plenary Power in the Nineteenth-Century Territories

Congress exercised plenary power, or the "combined powers of the general, and of a state government," over the territories of the United States throughout the nineteenth century.[86] Following the pattern first established by the Northwest Ordinance,[87] Congress passed

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85 Indeed, with one exception, it never did. See Part II.B.4.

86 *American Insurance Co v 356 Bales of Cotton (David Canter, Claimant)*, 26 US (1 Pet) 511, 546 (1828) ("*Canter*").

87 An Act to Provide for the Government of the Territory North-West of the River Ohio, 1 Stat 50, 51 n (a) (1789) ("Northwest Ordinance").

organic acts establishing governments with congressionally appointed governors, partially elected legislatures, and untenured judges; reserved the right to annul territorial laws; and limited each territory's federal representation to one nonvoting delegate in the U.S. House of Representatives.[88] Upholding Congress's exercise of plenary power to govern territories, the Court conceived of the scope of this congressional discretion expansively. For instance, in the 1879 opinion in *National Bank v County of Yankton*,[89] the Court explained Congress's plenary power to govern territories as follows:

> All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States.[90]

Congress's power over the territories was so broad, the Court went on, that "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void."[91]

Along with this broad conception of Congress's power to govern the territories, the reasoning that the source of such power might be found outside the Constitution had formed part of the Court's territorial jurisprudence long before 1901. To be sure, the Court occasionally identified the relevant source of power as the Territory Clause, which states that "Congress shall have Power to dispose of and make all

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88 See Leibowitz, *Defining Status* at 6–16 (cited in note 11); Max Farrand, *The Legislation of Congress for the Government of the Organized Territories of the United States, 1789–1895* 50 (Wm. A. Baker 1896).

89 101 US 129 (1879).

90 Id at 133. Importantly, the Court qualified the assertion with an exception for those powers "as have been expressly or by implication reserved in the prohibitions of the Constitution." Id. As discussed below, see text accompanying notes 157–63, the Court often balanced its assertions of plenary power with acknowledgments of its constitutional limitations—a practice that would continue even in the *Insular Cases*.

91 *Yankton*, 101 US at 133.

needful Rules and Regulations" for the territories.[92] At other times, though, the Court attributed Congress's power to govern the territories to a nebulously defined "general right of sovereignty,"[93] not found in any specific provision of the Constitution. Sometimes the Court cited both sources simultaneously. For example, Chief Justice John Marshall wrote in his 1810 decision in *Sere v Pitot*:[94]

> The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the constitution of the United States declares that "congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[95]

At other times, the Court asserted that the federal government simply must have the power to govern territories. "It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired," went the reasoning in an 1890 opinion.[96] The Court stated:

> The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplo-

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92 US Const Art IV, § 3, cl 2. See, for example, *United States v Gratiot*, 39 US (14 Pet) 526, 537 (1840) (describing Congress's power under the Territory Clause as "vested in congress without limitation" and as "the foundation upon which the territorial governments rest"); *Cross v Harrison*, 57 US (16 How) 164, 193 (1853) (explaining that ceded territory came under the sovereignty of the United States "under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"). But see *Dred Scott v Sandford*, 60 US (19 How) 393, 432 (1856) (reasoning that the Territory Clause had "no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States").

93 *Canter*, 26 US (1 Pet) at 546 ("They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government."). See also *United States v Kagama*, 118 US 375, 380 (1886):

> [T]his power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the [Territory Clause] in the Constitution . . . as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else.

94 10 US (6 Cranch) 332 (1810).

95 Id at 336–37, quoting the Territory Clause, US Const Art IV, § 3, cl 2. See also *Canter*, 26 US (1 Pet) at 542–43 (noting that the territory of Florida was governed either under the Territory Clause or as "the inevitable consequence of the right to acquire territory," but that, "[w]hichever may be the source whence the power is derived, the possession of it is unquestioned").

96 *Late Corporation*, 136 US at 42.

> matic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories.[97]

In short, the idea of Congress's plenary power to govern territories was well established by 1901, and the reasoning that such power might not emanate from the Constitution per se had already appeared in a number of the Court's decisions.

If Congress already had wide discretion over territories, and the Court already had reasoned that such discretion might well be derived from a vaguely defined inherent right of sovereignty rather than from the Constitution, what was the point of distinguishing between incorporated and unincorporated territories after 1898?

The answer, according to scholarship on the *Insular Cases*, is that the doctrine gave Congress even greater flexibility in governing the territories than it already possessed under the plenary power doctrine.[98] In this view, the Court's earlier rhetorical flourishes concerning the broad scope of congressional power over territories should not obscure the fact that the Constitution substantially limited this power. Something more than the modest nineteenth-century version of the plenary power doctrine would be necessary in order for the United States to assemble a colonial empire. The solution, according to this argument, lay in releasing the federal government from most, if not all, constitutional restraints.

We have seen that the *Insular Cases* held a number of constitutional provisions inapplicable in the unincorporated territories: the Uniformity Clause, the Export Clause, and several provisions relating to juries. Turning to the nineteenth-century precedents, we should find that, despite the Court's insistence on the plenary nature of Congress's power over the territories and intimations of an extraconstitutional source for this power, the "entire" Constitution somehow applied "in full" in these earlier territories. This, in turn, should explain why an unprecedented doctrine became necessary in order to exempt Congress from constitutional requirements in the new territories.

But the precedents turn out to be more ambiguous on this point than one would expect. If anything, they reveal that the status of constitutional provisions in the territories had long been a source of confusion, and continued to be so even up to 1901. Moreover, they show that the doctrine of plenary power already provided ample ground for

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[97] Id.

[98] See, for example, Rivera Ramos, 65 Revista Jurídica Universidad Puerto Rico at 311–12, 323–24 (cited in note 2); T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 Const Commen 15, 37 (1994).

withholding most, if not all, of the requirements of the Constitution from the territories.

1. The geographic scope of the Constitution.

It makes sense to dispense at the outset with the most exaggerated claim in the scholarship on the *Insular Cases*: that the Constitution applies—"all" of its provisions, "entirely" and "in full"—in those places incorporated into the United States, while only its fundamental provisions apply in the unincorporated territories. This assertion figures prominently in the literature on these decisions,[99] with few exceptions.[100] Courts, too, have read the *Insular Cases* as distinguishing between incorporated and unincorporated territories on the ground that the "entire" Constitution applies "with full force" only in the former.[101]

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[99] See notes 39–40 and accompanying text.

[100] See, for example, Fiss, *Troubled Beginnings of the Modern State* at 228 (cited in note 6):

> Much of the debate, in Court and the body politic, was conducted under the heading: "Does the Constitution follow the flag?" But for the justices—for a Court that rendered decisions such as *Lochner*, *Reagan*, *Pollock*, and *Debs*—this formulation was problematic. The constitutive theory of the state, the governing jurisprudence of the day, could not admit of the possibility of ever separating the flag and the Constitution.

(internal citations omitted). See also Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 248 (Yale 1998) (explaining, with respect to whether the Establishment Clause applied in the territories, that "[t]he clause does apply—formally, the Constitution always applies. But (on one reading) the clause simply has no bite"); Carman F. Randolph, *The Insular Cases*, 1 Colum L Rev 436, 449 (1901) ("The nearly unanimous opinion of the Court affirming the general obligation of the Bill of Rights in our new possessions . . . is a notable feature of The Insular Cases."). Laughlin adopts an ambiguous stance toward the traditional doctrine. *Law of United States Territories* ch 7 at 105–27 (cited in note 2). In some places, Laughlin offers the more traditional formulation: "The *Insular Cases* would come to stand for two propositions: (1) The Constitution applies *ex proprio vigore*, of its own force, throughout a territory which is incorporated into the United States; and (2) only 'fundamental' constitutional rights apply to an unincorporated territory," id at 114–15; "Alaska was incorporated . . . [so] the Constitution was thus fully applicable," id at 129. In other places, Laughlin claims that the Constitution always operates in any territory. See, for example, id at 108 ("Congress . . . has plenary power to legislate for the territories . . . . This does not imply, however, that Congress or the territorial governments it creates are unrestrained by the Constitution's specific limitations.").

[101] See, for example, *Examining Board of Engineers, Architects and Surveyors v Flores de Otero*, 426 US 572, 599 n 30 (1976):

> In a series of decisions that have come to be known as the *Insular Cases*, the Court created the doctrine of incorporated and unincorporated Territories . . . . The former category encompassed those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them *with full force*. . . . The latter category included those Territories not possessing that anticipation of statehood. As to them, only "fundamental" constitutional rights were guaranteed to the inhabitants.

(internal citations omitted) (emphasis added); *Torres v Puerto Rico*, 442 US 465, 469 (1979) ("Justice Edward White's concurring opinion announced the doctrine that the United States could acquire territory without incorporating it into the Nation, and that unincorporated territory was not subject to all the provisions of the Constitution."); *Northern Mariana Islands v Atalig*, 723 F2d 682, 688 (9th Cir 1984):

But to explain the incorporated/unincorporated distinction in these terms needlessly confuses matters, for the "entire" Constitution does not apply, as such, anywhere. Some parts of it apply in some contexts; other parts in others. Numerous constitutional provisions (notably those addressing representation in the federal government) never applied outside the states,[102] before or after 1901, whether a territory was incorporated or not. Other parts (such as the Territory Clause itself) never applied in the states.[103]

The *Insular Cases* did not change any of this. The sweeping distinction between places in which the entire Constitution applies, and places in which most of it does not apply, reflects the terms of a contemporary popular debate in which the question of what the United States could and should do with the former Spanish colonies was sometimes articulated through the shorthand of whether the Constitution "followed the flag."[104] Legal scholars in turn rendered the popular phrase in more legalistic terms as whether the Constitution applies *ex proprio vigore* in the unincorporated territories.[105] But while the popular rhetoric captures something of the tone of these contemporary political debates, neither that rhetoric nor its "legal" translation accurately describes the doctrinal content of the *Insular Cases*.

One clear example of this inaccuracy involves Article III's provisions on the "judicial power of the United States."[106] Although these provisions expressly refer to the "United States," they did not apply in any territory, incorporated or otherwise, even after the *Insular Cases*

> The doctrine of "territorial incorporation" announced in the *Insular Cases* distinguishes between incorporated territories, which are intended for statehood from the time of acquisition and in which the *entire* Constitution applies *ex proprio vigore*, and unincorporated territories, which are not intended for statehood and in which only fundamental constitutional rights apply by their own force.

(emphasis added); *Wabol v Villacrusis*, 958 F2d 1450, 1459 (9th Cir 1992) ("It is well established that the *entire* Constitution applies to a United States territory *ex proprio vigore*—of its own force—only if that territory is 'incorporated.' Elsewhere, absent congressional extension, only 'fundamental' constitutional rights apply in the territory.") (internal citation omitted) (emphasis added); *Montalvo v Colon*, 377 F Supp 1332, 1336 (D PR 1974) ("Basically, the territories of the United States were divided into two classes: incorporated territories, those clearly destined for statehood, in which the Constitution applied *in full*; and unincorporated territories . . . not clearly destined for statehood at the time of acquisition, in which the Constitution applied to some lesser degree.") (internal citation omitted) (emphasis added). But for a discussion of contrary language in *Montalvo*, see note 69.

102 Hence the need for a constitutional amendment to grant the citizens who reside in the District of Columbia the right to participate in presidential elections. See US Const Amend XXIII.

103 See also, for example, the District Clause, which gives Congress plenary power to govern the District of Columbia. US Const Art I, § 8, cl 17.

104 See note 3.

105 See, for example, Rivera Ramos, 65 Revista Jurídica Universidad Puerto Rico at 269 (cited in note 2).

106 US Const Art III, §§ 1–2.

made clear that some territories were within the boundaries of the "United States" and others not.[107] The inapplicability of these Article III provisions in all of the territories is not an obscure fact, but students of the *Insular Cases* dismiss it as an exception to the broad claim that the entire Constitution applies in the incorporated territories. Yet the inapplicability of Article III provisions even in those territories within the boundaries of the "United States" reveals the inadequacy of the standard characterization of the difference between incorporated and unincorporated territories.

As early as 1810, in *Sere*, Chief Justice Marshall explained that the phrase "United States" as used in Article III did not include the territories.[108] Congress could even establish a "district court of the United States" in a territory, separate from its local courts;[109] but in so doing,

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107 Common wisdom and scholarly consensus have it that Puerto Rico's federal district court became an "Article III" court eventually, after Congress eliminated the differences between that court and other federal district courts. In 1956, Congress amended the definition of "states" in the diversity jurisdiction provision to include Puerto Rico and the other territories. See To Amend Title 28 of the United States Code to Provide That the Commonwealth of Puerto Rico Shall Be Treated as a State for Purposes of District Court Jurisdiction Based on Diversity of Citizenship, Pub L No 808, 70 Stat 658 (1956), codified at 28 USC §§ 119, 1332 (2000) and 48 USC § 864 (2000). In 1966, Congress granted life tenure to the judges of Puerto Rico's federal district court. See To Provide the Same Life Tenure and Retirement Rights for Judges Hereafter Appointed to the United States District Court for the District of Puerto Rico as the Judges of All Other United States District Courts Now Have, Pub L No 89-571, 80 Stat 764 (1966), codified at 28 USC §§ 119, 133, 134 (2000). In 1970, Congress further revised that court's jurisdiction, leaving it with the same jurisdiction as other federal district courts. See To Provide for the Appointment of Additional District Judges, and for Other Purposes, Pub L No 91-272, 84 Stat 294, 298 (1970), codified at 28 USC § 133. See also Ellen E. Sward, *Legislative Courts, Article III and the Seventh Amendment*, 77 NC L Rev 1037, 1048 (1999) ("The United States district courts in Puerto Rico and the District of Columbia are created under Article III, so their judges have the tenure and salary protections of other Article III judges."); Juan R. Torruella, *¿Hacia Dónde Vas Puerto Rico?*, 107 Yale L J 1503, 1516 n 71 (1998) ("The District Court for Puerto Rico became an Article III court.").

In my view, it would be more accurate to say that Congress established a federal district court in Puerto Rico analogous to an Article III court, rather than to suggest that Congress had the discretion to "extend" Article III to Puerto Rico. Article III imposes requirements upon Congress when it establishes federal courts: arguably, if Congress were subject to such requirements in Puerto Rico, it would have been subject to them from the outset, a position for which no one has argued. See *O'Donoghue v United States*, 289 US 516, 550–51 (1933) (holding that the federal court in the District of Columbia was an Article III court, and explaining prior decisions upholding Congress's exercise of its Article I District Clause powers to vest administrative authority in the D.C. federal court by reasoning that the court had, for a time, exercised combined Article III and Article I jurisdiction). Of some interest in light of the broader argument in this Article is the reasoning in *O'Donoghue* that the District of Columbia differs from the territories in part because its status within the United States is "permanent," whereas that of the territories is "impermanent" and "ephemeral." Id at 537–42.

108 10 US (6 Cranch) at 337 (relying on Article IV, § 3, cl 2 for the proposition that Congress may grant territorial courts whatever jurisdiction it deems proper).

109 Id. The case came to the Court on writ of error from the district court of the United States for the District of Orleans. The territory of Orleans was the only continental territory in

Marshall reasoned, Congress exercised its "absolute and undisputed power" to govern territories, not its power to establish courts of the United States under Article III.[110] The Court reiterated this conclusion in *American Insurance Co v 356 Bales of Cotton (David Canter, Claimant)*[111] ("*Canter*"), which held that tribunals created by the territorial legislature in Florida, pursuant to Congress's organic act establishing a civil government there, were not Article III courts.[112] Although Congress's organic act for Florida provided that the jurisdiction of Florida's territorial courts would extend to "all cases arising under the laws and Constitution of the United States,"[113] Chief Justice Marshall again explained, "These Courts . . . are not constitutional Courts . . . . They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the Territory belonging to the United States."[114] The Court confirmed this conclusion in the 1850 decision *Benner v Porter*,[115] explaining that Florida's territorial government and its courts were "not organized under the Constitution . . . *as the organic law*," but were "creations . . . of the legislative department."[116] In *Clinton v Englebrecht*,[117] the Court similarly upheld a challenge to jury selection procedures where a territorial court had followed procedures estab-

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which Congress established a federal court separate from the local territorial court system. See *Sketches of the Establishment of the Federal Courts by States [Jurisdiction] and Their Judges*, 212 FRD 611, 694–95 (2003). On the federal courts in the territories, see Part II.B.4.

110 *Sere*, 10 US (6 Cranch) at 337.

111 26 US (1 Pet) 511 (1828).

112 Id at 546:

> [Territorial Florida courts] are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. . . . The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress.

113 An Act for the Establishment of a Territorial Government in Florida, 3 Stat 654, 656 (1822).

114 *Canter*, 26 US (1 Pet) at 546. Marshall based his conclusion in *Canter* (that the courts of the territory of Florida were not created under Article III) in part on the reasoning that Florida's territorial judges did not have life tenure, but rather held office for four-year terms. This logic put the cart before the horse: Marshall could have reached the conclusion that the limited terms of office of Florida's judges violated the requirements of Article III, rather than relying on these limited terms as evidence that Article III did not apply. But he did not, and instead reiterated the proposition from *Sere* that territorial courts were legislative courts, not Article III courts.

115 50 US (9 How) 235 (1850).

116 Id at 242 (emphasis added). In *Benner*, the phrase "as the organic law" modifying "the Constitution" makes the difference: the point was not that Florida's territorial courts were not organized under the Constitution, but only that the Constitution did not serve as the territory's organic law. Instead, the organic act passed by Congress served as the organic law in the territory.

117 80 US (13 Wall) 434 (1871).

lished by Congress for United States courts, rather than those established by the territorial legislature for the courts of that territory.[118]

In short, although it is well settled that Article III judiciary provisions do not apply in any of the territories, whether incorporated or not, for some reason this fact has not shaken the standard claim regarding the outcome of the *Insular Cases*: that the Constitution applied "in full" in the incorporated territories, while not in the unincorporated territories. Instead, Article III has been cabined as an exception to the general rule. However, as I show in the next Part, a review of the Court's nineteenth-century decisions on the applicability of other constitutional provisions in the territories reveals further exceptions—enough, indeed, to swallow the rule altogether. As I will demonstrate, there was ample nineteenth-century precedent for withholding constitutional provisions from the territories. No one needed the *Insular Cases* to authorize such action.

2. The Constitution in the territories before 1901.

The Constitution's ambiguous role in the territories prior to 1901 has by no means entirely escaped scholarly attention, even among those who argue that the *Insular Cases* broke with precedent.[119] Indeed it would be difficult to ignore the existence of earlier disagreements over the applicability of the Constitution in the territories: antebellum controversies over slavery famously played out in debates over whether Congress possessed the power to prohibit slavery in the territories, or whether the Constitution required Congress to permit, or even protect, slavery there.[120] These debates, which increased dramatically in intensity and bitterness in the years leading up to the Civil War, unfolded in terms that would be echoed in the turn-of-the-century debate over imperialism. Defenders of slavery argued that the Constitution "followed the flag," or extended *ex proprio vigore*, and without the aid of congressional legislation, to all places under U.S. sovereignty, and that it protected slavery, because it restrained Congress from prohibiting slavery.[121] Their opponents argued that the Constitution did not "follow the flag" to the territories, and that the status of slavery in the territories therefore lay entirely within Congress's

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118 Id at 435–36.

119 See notes 80–84 and accompanying text.

120 See generally Don E. Fehrenbacher, *The* Dred Scott *Case: Its Significance in American Law and Politics* ch 6 (Oxford 1978).

121 See id at 145 (asserting that defenders of slavery argued "not only that slavery automatically followed the Constitution, but also that the Constitution automatically followed the flag—a proposition of doubtful validity that would still be in dispute a half-century later").

discretion.[122] When *Dred Scott v Sandford*[123] brought this debate to the Court, Chief Justice Roger Taney reasoned in part that the Due Process Clause prevented Congress from interfering with slavery in the territories.[124] The *Dred Scott* decision, though soon discredited, offered some support for the argument that the Constitution applied in the territories. In fact, anti-imperialists at the turn of the century occasionally found themselves in the uncomfortable position of pointing to *Dred Scott* as the strongest anti-imperialist judicial precedent in their favor.[125]

But the precise scope of the Constitution in the territories remained ambiguous—and contested on the Court—during the second half of the nineteenth century, and not only because *Dred Scott* emerged from the Civil War with its reputation in tatters.[126] One reason for the ambiguity was that Congress had always "extended" the Constitution to the territories by statute, an action that left open the question of whether constitutional prescriptions would have applied of their own force (that is, absent statutory extension).[127] For instance,

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122 See id at 156–57.

123 60 US (19 How) 393 (1856).

124 Id at 450 ("[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law."). On the connections between *Dred Scott* and the *Insular Cases*, see, for example, Sanford Levinson, *Installing the* Insular Cases *into the Canon of Constitutional Law*, in Burnett and Marshall, eds, *Foreign in a Domestic Sense* 121, 129–30 (cited in note 2); Priscilla Wald, *Terms of Assimilation: Legislating Subjectivity in the Emerging Nation*, in Amy Kaplan and Donald E. Pease, eds, *Cultures of United States Imperialism* 59, 79–80 (Duke 1993).

125 The government's brief in *Goetze v United States*, 182 US 221 (1901), for example, chided the plaintiffs for relying on *Dred Scott*, a case that the government asserted had been reduced to "a byword and a hissing." See Brief for the United States, *Goetze v United States* at 212 (cited in note 1), quoting John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* § 499 at 318 (Rothman 1997) (originally published 1879). See also Argument in Reply for the Plaintiff, *Fourteen Diamond Rings v United States*, No 419 (US 1900), reprinted in Howe, ed, *The Insular Cases* 457, 483–85 (cited in note 1).

126 The question also was contested in the context of states: whether and how the provisions of the Bill of Rights applied against states had been (and continued to be) a source of disagreement among the justices. For a discussion of the pre-1901 parallels in these two debates, see Amar, *The Bill of Rights* at 247–51 (cited in note 100). On the post-1901 parallels, see Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 UCLA Chicano-Latino L Rev 1, 19–34 (2001).

127 See Northwest Ordinance, 1 Stat at 51–53 n (a) (reenacting the Northwest Ordinance, and making certain revisions "so as to adapt the same to the present Constitution of the United States"); An Act Erecting Louisiana into Two Territories, and Providing for the Temporary Government Thereof, 2 Stat 283, 284, 287 (1804) (Orleans and Louisiana); An Act to Divide the Indiana Territory into Two Separate Governments, 2 Stat 309, 309 (1805) (Indiana); An Act for Dividing the Indiana Territory into Two Separate Governments, 2 Stat 514, 515 (1809) (Illinois); An Act Supplementary to an Act Entitled "An Act for the Admission of the State of Louisiana into the Union, and to Extend the Laws of the United States to the Said State," 2 Stat 743, 744 (1812) (Missouri); An Act Establishing a Separate Territorial Government in the Southern Part of the Territory of Missouri, 3 Stat 493, 494 (1819) (Arkansas); An Act for the Establishment of a

§ 1891 of the Revised Statutes codified a blanket provision to this effect: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereinafter organized as elsewhere in the United States."[128] The territories annexed in 1898 were exempted by Congress from § 1891, either implicitly (in the case of Puerto Rico)[129] or explicitly (in the case of the Philippines).[130] Their

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Territorial Government in Florida, 3 Stat 654, 655 (1822); An Act Establishing the Territorial Government of Wisconsin, 5 Stat 10, 15 (1836); An Act to Divide the Territory of Wisconsin and to Establish the Territorial Government of Iowa, 5 Stat 235, 239 (1838); An Act to Establish the Territorial Government of Oregon, 9 Stat 323, 325–26, 329 (1848) ("Oregon Organic Statute"); An Act to Establish the Territorial Government of Minnesota, 9 Stat 403, 405, 407 (1849); An Act Proposing to the State of Texas the Establishment of Her Northern and Western Boundaries, the Relinquishment by the Said State of All Territory Claimed by Her Exterior to Said Boundaries, and of All Her Claims upon the United States, and to Establish a Territorial Government for New Mexico, 9 Stat 446, 449, 452 (1850); An Act to Establish a Territorial Government for Utah, 9 Stat 453, 458 (1850); An Act to Establish the Territorial Government of Washington, 10 Stat 172, 175, 178 (1853); An Act to Organize the Territories of Nebraska and Kansas, 10 Stat 277, 279, 282–83, 285, 289 (1854); An Act to Provide a Temporary Government for the Territory of Colorado, 12 Stat 172, 176 (1861); An Act to Organize the Territory of Nevada, 12 Stat 209, 214 (1861); An Act to Provide a Temporary Government for the Territory of Dakota, and to Create the Office of Surveyor General Therein, 12 Stat 239, 244 (1861); An Act to Provide a Temporary Government for the Territory of Arizona, and for Other Purposes, 12 Stat 664, 665 (1863); An Act to Provide a Temporary Government for the Territory of Idaho, 12 Stat 808, 813 (1863); An Act to Provide a Temporary Government for the Territory of Montana, 13 Stat 85, 91 (1864); An Act to Provide a Temporary Government for the Territory of Wyoming, 15 Stat 178, 183 (1868); An Act to Provide a Temporary Government for the Territory of Oklahoma, to Enlarge the Jurisdiction of the United States Court in the Indian Territory, 26 Stat 81, 84, 96 (1890).

Some of these statutes incorporated the Northwest Ordinance by reference; some simply stated that the laws passed by the territorial legislature must not be inconsistent with the Constitution and laws of the United States insofar as applicable; and some contained a separate provision "extending" the Constitution and laws of the United States to the territory, again insofar as applicable. The latter usually used language similar to that of § 1891 of the Revised Statutes (quoted in the text following this note). Legislation for Alaska in 1884, An Act Providing a Civil Government for Alaska, 23 Stat 24, 25 ("Alaska Organic Act"), did not contain a similar provision, but its enactment followed the enactment of § 1891, which had been made applicable to all organized territories. The organic act for Hawaii, An Act to Provide a Government for the Territory of Hawaii, 31 Stat 141, 141–42 (1900) ("Hawaii Organic Act"), contained a separate "extension" provision as well.

128 An Act to Revise and Consolidate the Statutes of the United States, in Force on the First Day of December, Anno Domini One Thousand Eight Hundred and Seventy-Three § 1891, 18 Stat 1, 333 (1878). On the use of the phrase "not locally inapplicable" in the context of Puerto Rico, see note 131.

129 The Foraker Act, the organic act for Puerto Rico, did not expressly exempt Puerto Rico from the Constitution or § 1891, but omitted mention of either in the relevant provisions. Instead, the act referred to the applicability or inapplicability of federal statutory laws. See Foraker Act, 31 Stat at 80:

> [T]he statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico.

See also id at 79.

organic acts contained different, specifically tailored provisions concerning the applicability of the Constitution and federal laws.[131] Nevertheless, the very act of statutory extension had raised doubts all along about whether the Constitution applied of its own force in the territories—not only because the extension of already applicable provisions would arguably have been redundant,[132] but also because the relevant congressional statutes expressly left open the possibility that at least some provisions were inapplicable (as did § 1891, which extended only those provisions "not locally inapplicable"), without specifying which ones these were.

Some Court decisions made clear that certain constitutional provisions did apply of their own force in the territories, but others stood for the proposition that Congress had applied the substance of the relevant constitutional provision in the territory by statute, and still others failed to choose between these two sources. Two cases decided in 1897 illustrate the ambiguity. In *American Publishing Co v Fisher*,[133] the Court held that the right to a jury trial in suits at common law applied in the territories, but expressly declined to identify the source of the right.[134] Two weeks later, in *Springville v Thomas*,[135] the Court held

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130 The organic act for the Philippines expressly exempted that territory from § 1891: "The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands." An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, and for Other Purposes, 32 Stat 691, 692 (1902) ("Philippine Organic Act").

131 The use of the phrase "not locally inapplicable" with regard to federal statutory law in the Foraker Act has been interpreted by some as evidence that Congress intended to confer upon Puerto Rico an especially high degree of autonomy. For instance, in *Cordova & Simonpietri Insurance Agency, Inc v Chase Manhattan Bank NA*, 649 F2d 36 (1st Cir 1981), the First Circuit Court of Appeals explained that Congress had a choice, when considering language for the Foraker Act in 1900, between the phrase "not locally inapplicable" and a "simpler" phrase, "so far as . . . may be applicable," which Congress had used with respect to certain nineteenth-century territories. See id at 43 n 34. Tracing the origins of the "not locally inapplicable" language to the debates over slavery in the territories and the Compromise of 1850, the First Circuit reasoned that Congress's choice of that phrase in the case of Puerto Rico "reflect[ed], if anything, a more, rather than less, deferential view of the effect of local social, economic and legislative developments on general federal law." Id. However, the court neglected to mention that Congress used the phrase "not locally inapplicable" with reference to every territory starting in 1861, and again in 1878 with reference to the territories as a whole in the blanket provision of § 1891 of the Revised Statutes. See 18 Stat at 333. Although Congress went on to legislate separately for Puerto Rico, the fact that Congress had been using the same phrase since the mid–nineteenth century arguably offers an even better explanation of its choice of language in 1900, and casts doubt on the reasoning that Congress wished to express "a more, rather than less, deferential view" of Puerto Rican autonomy.

132 For a modern instance of the argument that it would be redundant to "extend" already applicable constitutional provisions in the context of Puerto Rico, see Chief Justice William H. Rehnquist's dissenting opinion in *Examining Board*, 426 US at 607–08.

133 166 US 464 (1897).

134 Id at 466–68.

135 166 US 707 (1897).

that the Seventh Amendment right to a civil jury trial did apply, of its own force, in the territories.[136] Writing for the full Court in *Fisher*, Justice David J. Brewer noted, "Whether the Seventh Amendment to the Constitution of the United States ... operates *ex proprio vigore* to invalidate [a statute passed by the territorial legislature of Utah] may be a matter of dispute."[137] He then cited a series of conflicting Supreme Court decisions on the matter: one had relied upon both the Constitution and a congressional statute extending Seventh Amendment jury trial rights to the territory in question;[138] two others had relied solely upon the constitutional provision;[139] and the last had questioned whether the constitutional provision applied at all, relying instead solely upon the statute.[140] Brewer explained that the organic act at issue provided "that the constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah,"[141] and that a later federal statute respecting Utah included a specific reference to the Seventh Amendment jury trial right.[142] As a result, he concluded, "*either* the Seventh Amendment to the Constitution, *or* these acts of Congress, *or all together*, secured to every litigant in a common law action in the courts of the Territory of Utah the right to a trial by jury."[143]

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136 Id at 708–09 (holding that in the territory of Utah "the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule"). See US Const Amend VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."). *Fisher* was decided on April 12, 1897, and *Springville* fourteen days later on April 26, 1897. Cleveland characterizes *Fisher* as not addressing "the source of the Constitution's application," and *Springville* as addressing and resolving it (by concluding that the Seventh Amendment applied of its own force). 81 Tex L Rev at 198 (cited in note 3). But, as I argue here, in *Fisher*, Brewer directly addressed the question, and expressly withheld judgment on it: he emphasized that the Court had issued conflicting decisions respecting the applicability of the Constitution in the territories, pointed out that the issue had never been resolved, and concluded that it need not be resolved in that case either. See *Fisher*, 166 US at 466–68.

137 166 US at 466. By the time of the *Fisher* decision, Utah had become a state, but the events at issue had occurred prior to statehood.

138 See *Webster v Reid*, 52 US (11 How) 437, 460 (1850) (extending Seventh Amendment protection by some combination of the organic statute and the Amendment itself).

139 See *Reynolds v United States*, 98 US 145, 154 (1878) ("By the Constitution of the United States (Amend. VI.), the accused [a defendant in the territory of Utah] was entitled to a trial by an impartial jury."); *Callan v Wilson*, 127 US 540, 550 (1888) ("There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of [the District of Columbia] may be lawfully deprived of the benefit of any of the constitutional guarantees.").

140 *Late Corporation*, 136 US at 44.

141 *Fisher*, 166 US at 467, quoting 9 Stat at 458.

142 *Fisher*, 166 US at 467, citing 18 Stat at 27.

143 *Fisher*, 166 US at 467–68 (emphasis added).

In *Springville*, the case decided two weeks after *Fisher*, Chief Justice Melville Weston Fuller declared not only that the Seventh Amendment applied in the territories, but that an "act of Congress could not impart the power [to the territorial legislature] to change the constitutional rule."[144] Fuller cited *Fisher* in support of this proposition,[145] though Brewer's opinion in *Fisher* had pointedly withheld judgment on the matter. Arguably, *Springville* superseded *Fisher* (even while citing *Fisher* for support). However, in light of the Court's previous ambiguous and inconsistent pronouncements on the matter, *Springville* can plausibly be read as yet another conflicting decision in an inconclusive line of cases.

The earlier decisions casting doubt on the automatic applicability of constitutional provisions in the territories that Brewer cited included the pre–*Dred Scott* decision in *Webster v Reid*,[146] in which the Court struck down an act of the territorial legislature of Iowa dispensing with jury trials in certain common law actions on the ground that the act violated the right to a trial by jury.[147] The Court in *Webster* had not explained whether its decision was based on the Seventh Amendment itself, or on Congress's organic act for the territory of Iowa: the *Webster* opinion, explained Brewer in *Fisher*, quoted the language of the Seventh Amendment, but also noted that the organic act of Iowa

> "by express provision and reference, extended the laws of the United States, including the ordinance of 1787, over the Territory, so far as they are applicable"; and the ordinance of 1787 . . . provided that "the inhabitants of the said Territory shall always be entitled to the benefits . . . of the trial by jury."[148]

As interpreted by Brewer, this reference to congressional legislation suggested that the Court may have been relying solely, or alternatively, on the federal statute in holding the right to a trial by jury applicable in Iowa.[149]

Another decision Brewer cited as suggesting doubts about the source of constitutional provisions in the territories was the 1890 *Late Corporation of Church of Jesus Christ of Latter-Day Saints v United States*.[150] Although the Court assumed in passing that First Amendment

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144 166 US at 708–09.

145 *Springville*, 166 US at 708, citing *Fisher*, 166 US at 466. Brewer, admittedly, did not dissent from the holding in *Springville*.

146 52 US (11 How) 437 (1850).

147 Id at 460.

148 *Fisher*, 166 US at 466, quoting *Webster*, 52 US (11 How) at 460.

149 *Fisher*, 166 US at 466 (stating that the invalidity of the challenged Iowa statute "may have been adjudged by reason of the conflict with Congressional legislation").

150 136 US 1 (1890).

religious protections applied in the territory of Utah (while observing at the same time that polygamy did not qualify for such protection because it did not amount to a religious practice),[151] the opinion expressly questioned whether the Constitution itself was the direct source of constitutional protections there:

> Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.[152]

This passage has been characterized by one scholar as dicta that "would support much mischief" in the *Insular Cases* by contradicting an established consensus on the applicability of the Bill of Rights in the territories.[153] But the asserted consensus was not all that well established; an equally plausible account would recognize the quoted passage as only one among a number of ambiguous and contradictory pronouncements by the Court on the source and limits of congressional power in the territories.

Yet another such pronouncement appeared in *McAllister v United States*,[154] which confirmed the inapplicability of Article III provisions relating to the tenure of federal judges in the territories.[155] That decision did not concern Bill of Rights protections, but the Court again noted the ambiguity concerning the authority of constitutional provisions in the territories: "How far the exercise of [Congress's plenary] power [over the territories] is restrained by the essential principles upon which our system of government rests, and which are embodied in the Constitution, we need not stop to inquire."[156]

These decisions did not go so far as to establish that earlier territories themselves belonged in an extraconstitutional zone: that claim does not fit the nineteenth-century territories any more than their twentieth-century counterparts. Rather, these precedents simply show that the applicability of specific constitutional provisions in the territories was unclear and subject to debate, even prior to 1901.

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151 Id at 49. The Court had issued a holding to this effect earlier. See *Reynolds*, 98 US at 166.

152 *Late Corporation*, 136 US at 44.

153 Neuman, *Strangers to the Constitution* at 82 (cited in note 78).

154 141 US 174 (1891).

155 Id at 184–85.

156 Id at 188.

At the same time, other decisions suggested that the Constitution played at least some constraining role upon government action in the territories, albeit an unclear one. This is evident, for instance, in the passage from the 1879 *Yankton* case, which described Congress's plenary power over territories in broad terms, and then immediately qualified the statement: "Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, *except such as have been expressly or by implication reserved in the prohibitions of the Constitution.*"[157] A similar passage, asserting both broad federal power over the territories and a limiting role for the Constitution, appeared in the 1885 decision in *Murphy v Ramsey*:[158]

> The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, *subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself.*[159]

These passages offered support for Chief Justice Fuller's reasoning in *Springville*—that the Seventh Amendment applied of its own force and that "Congress could not impart the power to change the constitutional rule."[160] Supportive precedents also included *Reynolds v United States*,[161] in which the Court expressly held certain provisions of the Bill of Rights directly applicable in the territory of Utah.[162] The *Reynolds* Court specifically explained that "Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion."[163]

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157 101 US at 133 (emphasis added). For the full quote, see text accompanying note 90.

158 114 US 15 (1885).

159 Id at 44 (emphasis added).

160 166 US at 709.

161 98 US 145 (1878).

162 Id at 154 (holding that "by the Constitution of the United States (Amend. VI.) the accused was entitled to a trial by an impartial jury" even though the trial and alleged crime both occurred in the territory of Utah).

163 Id at 162. See also *Capital Traction Co v Hof*, 174 US 1, 5 (1899) (holding federal civil and criminal jury trial rights applicable in the District of Columbia); *Callan*, 127 US at 550 (same); *Hopt v Utah*, 110 US 574, 579 (1884) (assuming that constitutional due process guarantees restrained the actions of a territorial legislature). While these decisions have some relevance to the issue, both *Capital Traction* and *Callan* concerned the District of Columbia, not a territory, which arguably raises different concerns. *Hopt*, though, would offer a weak basis for any assertion that the *Insular Cases* broke with precedent, because after 1901 the Court made the same assumption with respect to due process protections in the unincorporated territories. See, for example,

Such views, which supported Fuller's opinion in *Springville*, briefly prevailed. The year after *Springville*—1898, the year of the Spanish-American War—the Court again held that certain constitutional protections applied of their own force in the territories in the context of the right to a criminal trial by jury in *Thompson v Utah*.[164] Writing for the Court over the dissents of Justices Brewer and Rufus W. Peckham, Justice Harlan explained that the jury trial provisions of both Article III[165] and the Sixth Amendment[166] applied of their own force in the territories, restraining government action there.

Here Harlan tried to settle the disagreement once and for all, though even he limited his conclusions to the jury-related provisions. "That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question," he wrote,[167] although the dissents of two fellow justices in *Thompson* itself and Brewer's then-recent opinion in *Fisher* suggested otherwise. "It is equally beyond question," Harlan continued, "that the provisions of the National Constitution relating to trials by jury for crimes and to criminal prosecutions apply to the Territories of the United States."[168] Arguably, this language in *Thompson* did come closer to resolving the issue than prior decisions had done, not only for the obvious reason that it was decided later, but also because Harlan explicitly rejected the claim that constitutional protections extended to the territories only via statute, whereas the contrary decisions had merely left the matter unresolved. Nevertheless, in light of the dissents in *Thompson*, the evidence of an ongoing disagreement among the justices, the opposing precedents, the long-standing congressional practice of "extending" the Constitution to the territories by statute, and the then-imminent rejection of Harlan's blanket proposition in the *Insular Cases*, it overstates the case to declare, as students of the *Insular Cases* have done, that the *ex proprio vigore* applicability of the Constitution in the territories was settled by 1901, and that the *Insular Cases* contradicted an established consensus.

Ochoa v Hernandez, 230 US 139, 153–54 (1913); *United States v Heinszen & Co*, 206 US 370, 386 (1907). On the *Heinszen* case, which has not been included in the traditional list of the *Insular Cases* but perhaps should be, see note 289.

164 170 US 343, 346 (1898).

165 US Const Art III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.").

166 US Const Amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.").

167 *Thompson*, 170 US at 346.

168 Id at 347.

In fact, the supposed late-nineteenth-century consensus on the applicability of the Constitution in the territories was manufactured, with hindsight, in the *Insular Cases* themselves—specifically, in the 1905 *Rassmussen* case.[169] In *Rassmussen*, the Court held that federal constitutional rights relating to juries applied in Alaska, on the ground that Alaska was "incorporated"; in the process, the Court struck down a congressional statute providing for juries of fewer than twelve persons in certain criminal trials in that territory.[170] In his opinion for the Court, Justice White rejected the government's argument that the right to a trial by jury did not extend *ex proprio vigore* to the territory and could therefore be withheld by Congress. White began by acknowledging that the nineteenth-century precedents were ambiguous as to whether constitutional provisions applied in the territories by their own force or by statute:

> It is true that in some of the [nineteenth-century] opinions both the application of the Constitution and the statutory provisions declaring such application were referred to, but in others no reference to such statutes was made, and the cases proceeded upon a line of reasoning, leaving room for no other view than that the conclusion of the court was rested upon the self-operative application of the Constitution.[171]

He then pointed to several precedents that, in his view, established "conclusively" that the Sixth Amendment applied of its own force in the nineteenth-century territories, including Alaska.[172]

White's assertion that the late nineteenth-century cases had "conclusively" established the applicability of the Constitution to the territories would have served as confirmation of Harlan's statement in *Thompson* that the applicability of jury trial provisions in the territories was "no longer an open question," if not for the fact that Harlan

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169 197 US 516.

170 Id at 528.

171 Id at 526–27.

172 See id at 527–28. Just as Fuller had done in *Springville*, White cited *Fisher* to support a conclusion that *Fisher* itself had declined to reach. See *Rassmussen*, 197 US at 528, citing *Fisher*, 166 US at 466. White also cited *Black v Jackson*, 177 US 349, 363 (1900), which held that the Seventh Amendment right to a trial by jury was applicable in Iowa, though the passage White chose to quote was hardly unambiguous evidence of the *ex proprio vigore* applicability of the Constitution in the territories, since it too referred both to the constitutional provision and to the statute. See *Rassmussen*, 197 US at 527–28. The Court in *Black* did explain that the Seventh Amendment, "so far as it secures the right of trial by jury, applies to judicial proceedings in the Territories of the United States," but it added that "a court of a Territory authorized [by statute] as Oklahoma was to pass laws not inconsistent with the Constitution . . . could not proceed in a 'common law' action as if it were a suit in equity." *Black*, 177 US at 363, quoted in *Rassmussen*, 197 US at 528.

had intended his statement to apply to all of the territories, not merely "incorporated" ones (a category that had not even been invented when Harlan wrote *Thompson*). Instead, White, who also insisted that the pre-1898 territories were "incorporated," managed to suggest both that a consensus had indeed taken shape by the end of the nineteenth century (through decisions "conclusively" establishing that the Constitution applied of its own force to the territories), and that this consensus excluded the unincorporated territories.

Harlan proved wrong: the events of 1898 revealed that the applicability of the Constitution in the territories remained very much an open question. After *Rassmussen*, however, no one questioned that constitutional provisions applied of their own force in the territories—as long as they were "incorporated." Meanwhile, students of the *Insular Cases* came to believe that this result was consistent with a late-nineteenth-century consensus—precisely as White insisted in *Rassmussen*. To argue, as scholars have, that the Constitution applied in the territories until the *Insular Cases* changed course is to accept White's own dubious characterization of the nineteenth-century precedents.

B. The Constitution and Plenary Power in the Twentieth-Century Territories

As the preceding discussion demonstrates, the Court's nineteenth-century jurisprudence on the Constitution in the territories afforded ample support for the conclusion that certain constitutional provisions did not apply in the territories annexed in 1898. If the justices in the majority in the *Insular Cases* had wanted to withhold the Constitution from the new territories, they could easily have rested their decision on precedents suggesting that certain constitutional provisions applied in the territories only by congressional statutory "extension." Why, then, bother distinguishing between two classes of territories? What better basis for exempting Congress from the Constitution in the territories could the justices have needed than the reasoning, which had already found expression in the Court's jurisprudence, that restraints upon Congress in the territories "would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions"?[173] Or that Congress had "absolute and undisputed power" in the territories?[174] Or that Congress's power in the territories was based on a "general right of sovereignty"?[175] Or that

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[173] *Late Corporation*, 136 US at 44.

[174] *Sere*, 10 US (6 Cranch) at 337.

[175] *Canter*, 26 US (1 Pet) at 546.

Congress "may make a void act of the territorial legislature valid, and a valid act void"?[176] A colonial empire demanded flexibility, yes, but the legal groundwork for such flexibility was readily available in the nineteenth-century jurisprudence reviewed above. What purpose, then, did the distinction between incorporated and unincorporated territories serve?

In order to answer these questions, it is necessary to revisit the decisions in the *Insular Cases* themselves, in light of the nineteenth-century jurisprudence, and to determine precisely what they added to the plenary power doctrine. One must begin this task by narrowing the list to the relevant cases: for, despite their reputation as the decisions that justified "the extra-constitutional rule of American colonies,"[177] not all of the *Insular Cases* dealt with the applicability of the Constitution in the territories. Of the first nine cases in the series, only two dealt directly with the issue: *Downes*, which held the Uniformity Clause inapplicable in the unincorporated territories,[178] and the second of two cases called *Dooley v United States*[179] ("*Dooley II*"), which held that duties on goods shipped from New York to Puerto Rico did not violate the Export Clause.[180] The other seven decisions handed down in 1901 addressed whether the territories annexed in 1898 were "foreign countries" under the tariff laws of the United States or, in one case, under New York's pilotage statutes; all of these held that, after the ratification of the treaty ceding the territories to the United States, the new territories had ceased to be "foreign" within the meaning of the statutes in question.[181] Of the fourteen *Insular Cases* decided after 1901, up to and including the unanimous decision in 1922 in *Balzac*, six dealt with the applicability of constitutional provisions in the territories. All of these concerned jury-related rights: they held either that jury-related rights did not apply in unincorporated territories, or that these rights applied only in incorporated territories.[182] In the remaining

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176 *Yankton*, 101 US at 133.

177 Beisner, *Twelve Against Empire* at 162 (cited in note 29).

178 182 US at 287. The plaintiffs in *Downes* also based their challenges on the Export Clause and the Preference Clause. See note 37.

179 183 US 151 (1901).

180 Id at 157.

181 See *De Lima*, 182 US at 200; *Goetze*, 182 US at 221–22; *Dooley v United States*, 182 US 222, 235–36 (1901) ("*Dooley I*"); *Armstrong v United States*, 182 US 243, 244 (1901); *Huus v New York and Porto Rico Steamship Co*, 182 US 392, 397 (1901); *Fourteen Diamond Rings v United States*, 183 US 176, 181–82 (1901).

182 See *Balzac*, 258 US at 312–13; *Dowdell v United States*, 221 US 325, 329–32 (1911); *Rassmussen*, 197 US at 528; *Dorr*, 195 US at 148–49; *Mankichi*, 190 US at 217–18; *Ocampo v United States*, 234 US 91, 98 (1914).

eight cases, either the Court declined to reach the constitutional question, or the case did not raise one.[183]

Simply describing these holdings in summary form further erodes the claim that the *Insular Cases* carved out an extraconstitutional zone for the unincorporated territories. While it is certainly not insignificant that the Court held several constitutional provisions inapplicable in the unincorporated territories, these holdings hardly amount to withholding all but the "fundamental" provisions of the Constitution from those territories, nor do they somehow imply that the "entire" Constitution applied elsewhere. Moreover, even these eight constitutional holdings need to be further qualified, as outlined here, and discussed in greater detail in the Parts that follow.

First, while some of the language in the *Insular Cases* (such as Justice White's intimations that only "fundamental" rights applied everywhere)[184] created uncertainty over which provisions would turn out to apply in the unincorporated territories, we have already seen that such uncertainty did not originate with the *Insular Cases*, but dated to the Court's nineteenth-century territorial jurisprudence. This uncertainty itself, then, does not imply that the Court carved out an extraconstitutional zone for certain territories in 1901, any more than it did for territories prior to 1901. More importantly, overlooked language in several of the *Insular Cases* suggests that none of the justices had in mind anything so extreme as an extraconstitutional zone. As we will see, even Justice White took care several times to deny that territorial incorporation dictated whether the Constitution applied in a given territory.

Second, the decision in *Downes* (that the Uniformity Clause did not apply in the unincorporated territories)[185] needs to be reconsidered in light of *Binns v United States*.[186] In *Binns*, which has not generally been included in the literature on the *Insular Cases*,[187] the Court exempted Congress from uniformity requirements in legislating for Alaska, despite Alaska's status as a so-called incorporated territory.[188] In other words, just three years after *Downes* caused such a stir by

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183 See *Gonzales v Williams*, 192 US 1, 13 (1904); *Kepner v United States*, 195 US 100, 133–34 (1904); *Mendezona v United States*, 195 US 158, 158 (1904); *Trono v United States*, 199 US 521, 533 (1905); *Grafton v United States*, 206 US 333, 354–55 (1907); *Kent v Porto Rico*, 207 US 113, 114, 119–20 (1907); *Kopel v Bingham*, 211 US 468, 474 (1909); *Ochoa*, 230 US at 153–54.

184 See text accompanying notes 41–42.

185 182 US at 287.

186 194 US 486 (1904).

187 The only exception of which I am aware is David Currie's work on the *Insular Cases*. See, for example, David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986* 64 n 69 (Chicago 1990).

188 *Binns*, 194 US at 494–96.

exempting Congress from constitutional uniformity requirements in the unincorporated territories, *Binns* exempted Congress from the same constitutional requirements in an incorporated territory—which raises the question, again, of what purpose the distinction between incorporated and unincorporated territories was supposed to serve.

Third, *Dooley II* bears revisiting. In *Dooley II*, the Court upheld the imposition of duties on goods shipped from New York to Puerto Rico against the challenge that they violated the Export Clause.[189] The decision in *Dooley II* lends itself easily to revision: the Court in that case relied primarily on reasoning applicable to all territories, not just unincorporated ones, in exempting Congress from the restraints of the constitutional provision at issue.[190] Although White concurred (alone) in *Dooley II*, and cited *Downes* as the controlling precedent, even he relied on a distinction between states and territories as a whole.[191] Thus *Dooley II* further undermines the claim that a necessary connection exists between incorporation and the application of constitutional provisions.

Finally, the prevailing understanding of the decisions affecting grand jury and jury trial rights should be revised as well.[192] In these six decisions, the Court did establish a distinction between incorporated and unincorporated territories; it held constitutional rights to grand jury indictments and jury trials applicable *ex proprio vigore* in the territorial courts of incorporated territories, and inapplicable in the territorial courts of unincorporated territories. To that extent, the standard account has some merit. However, none of the *Insular Cases* held jury-related rights inapplicable in federal courts—that is, as distinct from local, or territorial, courts—even in the unincorporated territories. In Puerto Rico, Congress established a federal district court separate from the local court system (and provided for grand and petit juries from the start).[193] The *Insular Cases* dealing with jury-related rights in Puerto Rico did not hold that federal constitutional rights were unprotected in Puerto Rico's federal court; rather, they held jury-related

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189 183 US at 155, 157.

190 See id at 155–56.

191 See id at 157–66 (White concurring).

192 See note 182.

193 The Foraker Act provided for a "district court of the United States for the District of Puerto Rico," with one district judge to be appointed by the president. 31 Stat at 84. See generally Guillermo A. Baralt, *Historia del Tribunal Federal en Puerto Rico: 1899–1999* (Publicaciones Puertorriqueñas 2004) (tracing the history of the first hundred years of the district court in Puerto Rico); José A. Cabranes, *Judging in Puerto Rico and Elsewhere*, 49 Fed Lawyer 40, 43–44 (June 2002) (describing the use of juries in the early years of the federal court in Puerto Rico). On the federal courts in the territories, see Part II.B.4.

rights inapplicable in Puerto Rico's local courts.[194] In this respect, then, Puerto Rico was no different from a state, since the provisions of the Bill of Rights were inapplicable against the states at this time as well, and federal jury-related rights were constitutionally protected only in the federal courts.[195] This comparison between Puerto Rico and the states further undermines the standard account of the *Insular Cases*, with its claim that the Constitution applied in full in incorporated places—which, of course, included the states first and foremost—and not in unincorporated places.

A closer examination of these four points leaves little of the standard account standing.

1. Questioning the link between incorporation and the applicability of the Constitution.

Several passages in the *Insular Cases* support the familiar proposition that these decisions withheld all but the most fundamental constitutional provisions from the unincorporated territories. Most famously, as noted above, Justice White singled out "fundamental" rights, and seemed to consider only these applicable everywhere.[196] However, other passages, either dismissed or overlooked by students of the *Insular Cases*, had different implications altogether: these passages undermine the claim that the *Insular Cases* created a simple distinction between (incorporated) places in which the Constitution applied in full, and (unincorporated) places in which most constitutional protections did not apply.

One of these is a passage that scholars of the *Insular Cases* have often quoted, though they have not, in my view, entirely understood it. In the passage in question, Justice White admonished, "In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."[197] White was trying to suggest here that his doctrine did not imply the bright-line distinction that has been attrib-

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194 They did reason in the process that Puerto Rico was an "unincorporated" territory rather than analogize Puerto Rico to a state, but, again, the decisions concerned local territorial courts, not federal courts. See Part II.B.4.

195 See Amar, *The Bill of Rights* at 137–40 (cited in note 100); Currie, *Constitution in the Supreme Court* at 59 n 34 (cited in note 187) (discussing the applicability of the Bill of Rights to states in the context of a discussion of the *Insular Cases*); Soltero, 22 UCLA Chicano-Latino L Rev at 19–34 (cited in note 126) (comparing the debate over the incorporation of the Bill of Rights against the states with the debate over the incorporation of territories into the United States).

196 See *Downes*, 182 US at 291 (White concurring).

197 Id at 292.

uted to it ever since, between places where the "entire" Constitution applies and places where most or all of it does not. However, although White's doctrine prevailed, his effort to give it some nuance went largely unheeded. Students of the *Insular Cases* have rejected the semantic niceties involved in distinguishing between whether the Constitution was "operative" and whether its provisions were "applicable," for, once its provisions were held inapplicable, it would seem to make no difference whether it was somehow "operative." In this view, White's statement seems little more than an effort to soften the blow, so to speak: to make his doctrine look less draconian by asserting that the Constitution is always operative, even while arguing that most of its provisions do not apply.

The author of one analysis of the *Insular Cases*, Efrén Rivera Ramos, has specifically rejected White's attempt to reformulate the question, as rephrased by Chief Justice Taft in *Balzac*.[198] "[A]ccording to Taft," writes Rivera Ramos, "the 'real issue' in the *Insular Cases* was not whether the Constitution extended to the Philippines or Puerto Rico, but which of its provisions were applicable."[199] Rejecting the White/Taft version of the question, Rivera Ramos insists that "[a] perusal of the debate within the Court indicates that the applicability of the Constitution *ex proprio vigore* was a central issue. 'Whether the Constitution follows the flag,' was the popular formulation of the controversy."[200] Rivera Ramos argues that the question in the *Insular Cases*, at least initially, was indeed whether the Constitution, *tout simple*, applied in the new territories—and that the doctrine of territorial incorporation answered this question in the negative, leaving these places unprotected by all but a very few constitutional provisions.[201] This understanding, not the more subtle White/Taft version, dominates the scholarship on the *Insular Cases*.

But there is more evidence in support of the White/Taft formulation than the standard scholarly view recognizes. Additional language in the *Insular Cases* reveals that, even in the first group of cases, an extraconstitutional zone was not what the justices who advocated the doctrine of territorial incorporation sought to create. In a less often noted passage in *Downes*, for example, White made clear that not even the incorporation of a territory would necessarily mean that uni-

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198 See *Balzac*, 258 US at 312–13 ("The real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico . . . but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.").

199 Rivera Ramos, 65 Revista Jurídica Universidad Puerto Rico at 269 (cited in note 2).

200 Id.

201 See id at 270.

formity requirements applied there *ex proprio vigore*. Referring to the treaty of cession for Louisiana, which had exempted that territory from uniformity requirements for a term of years, White asserted that such exceptions did not contradict his doctrine:

> It is pertinent to recall that the treaty [for the cession of Louisiana] contained stipulations giving certain preferences and commercial privileges for a stated period to the vessels of French and Spanish subjects, and that even after [Congress incorporated the territory,] this condition of the treaty continued to be enforced, *thus demonstrating that even after the incorporation of the territory the express provisions conferring a temporary right which the treaty had stipulated for and which Congress had recognized were not destroyed, the effect being that incorporation as to such matter was for the time being in abeyance.*[202]

In other words, even after Louisiana had been incorporated, it had remained unincorporated for purposes of uniformity. Remarkably, according to the author of the doctrine of territorial incorporation himself, whether a particular constitutional provision applied in a given territory did not depend on whether the territory had been incorporated.

White made a similar observation in the first *Dooley* case. The Court in *Dooley v United States*[203] ("*Dooley I*") held that Puerto Rico remained foreign under the United States' tariff laws prior to the ratification of the treaty ceding the island, but had ceased to be foreign after ratification. Dissenting, White disagreed that Puerto Rico had ceased to be foreign after ratification; but he added that even if it had—that is, as he put it, even if Puerto Rico had been incorporated into the United States—uniformity requirements would not necessarily have applied there. He wrote:

> But, for the purposes of this case and *arguendo* only, let me now admit that the treaty incorporated Porto Rico into the United States despite the provisions which were contained in that instrument. Does it follow that such territory at once ceased to be subject to the tariff laws [applicable to foreign countries] before Congress had the time to act? I am constrained to think not.[204]

Again White denied the connection between incorporation of a territory into the United States and the applicability of uniformity requirements there. The *Downes* decision is supposed to have estab-

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202 *Downes*, 182 US at 332 (White concurring) (emphasis added).

203 182 US 222 (1901).

204 Id at 240–41 (White dissenting).

lished that uniformity requirements—and, along with them, most of the rest of the Constitution—did not apply in Puerto Rico because the island was not incorporated, and yet here we have Justice White himself insisting that even after the incorporation of a territory, uniformity might well remain inapplicable.

These passages raise serious questions about the widely held view that the *Insular Cases* established a necessary connection between incorporation (or the lack thereof) and the applicability (or inapplicability) of the Constitution. Evidently, Justice White himself did not intend the distinction between incorporated and unincorporated territories to play a decisive role in determining whether or not specific constitutional provisions applied in particular contexts.

2. *Binns v United States* and the Uniformity Clause.

Justice White's assertions that even incorporation would not necessarily translate into the application of uniformity requirements bore fruit in the 1904 decision in *Binns*.[205] In *Binns*, the Court upheld a special system of license taxes established by Congress in the territory of Alaska against a challenge that the taxes violated the uniformity requirement. The plaintiffs-in-error in *Binns* argued that the taxes were effectively "excise" taxes within the meaning of the Uniformity Clause, and that Congress was therefore precluded from imposing them solely upon Alaskan businesses.[206] The Court agreed that the taxes in question amounted to excise taxes, but rejected the challenge in a decision relying on an expansive interpretation of Congress's plenary power over territories.[207] Rather than inapplicable, the Court held that uniformity was simply irrelevant under these circumstances, because in passing the statute providing for these taxes, Congress had acted as the local government of Alaska, exercising the equivalent of a local (not federal) power to raise taxes.[208]

In his opinion for the Court, Justice Brewer began by rejecting the relevance of the *Insular Cases* to the question of Congress's power over Alaska, on the ground that Alaska was incorporated territory.[209] This was somewhat odd reasoning, for Brewer himself had joined Fuller's dissent in *Downes*, which had insisted that no territory had ever been "incorporated" until the *Insular Cases* themselves invented

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205 194 US 486. As noted above, David Currie includes *Binns* in his discussions of the *Insular Cases*. See note 187. However, he sees *Binns* as consistent with the standard account of the *Insular Cases*, whereas I argue here that *Binns* undermines the standard account.

206 *Binns*, 194 US at 490.

207 Id at 491.

208 Id at 491–96.

209 Id at 490–91.

the category in the first place. In any event, not even incorporation would save Alaskans from the challenged taxes: Brewer's statement simply made clear that uniformity requirements would pose no obstacle to the challenged taxes despite Alaska's status as incorporated territory.

Brewer assumed that the taxes were excise taxes "within the constitutional sense," and that uniformity requirements applied in Alaska.[210] However, he reasoned that the taxes must "be regarded as local taxes imposed for the purpose of raising funds to support the administration of local government in Alaska."[211] As a result, uniformity requirements became moot. This conclusion rested on the reasoning that Congress had plenary power to govern the territories, in both a federal and a local capacity. "It must be remembered," wrote Brewer, "that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution."[212] He went on:

> [T]he form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are accustomed to that generally adopted for the Territories, of a *quasi* state government, with executive, legislative and judicial officers, and a legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory.[213]

In short, Congress had plenary power to govern Alaska because Alaska was a territory; whether it was incorporated or not made no difference.

Brewer then explained that no one would have questioned Congress's capacity to impose the taxes had the statute followed the analogy to local government to its logical conclusion, by providing that the revenues should be paid into a local treasury and used only to cover the expenses of running the government of Alaska.[214] Instead, the statute provided that the revenues were to be paid into the federal treasury. The question, then, was whether this fact somehow undermined

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210 Id at 491.
211 Id.
212 Id.
213 Id.
214 Id at 494.

the local nature of the taxes, rendering them unconstitutional. It did not, explained Brewer, for two related reasons: it was "obvious" that Congress intended the taxes to raise revenues solely for the costs of governing Alaska, and "the sum total of these and all other revenues from the Territory" was less than the cost of maintaining Alaska's government.[215]

This last point was crucial: in the concluding passage, Brewer carefully noted that the holding in *Binns*

> must not be extended to any case, if one should arise, in which it is apparent that Congress is, by some special system of license taxes, seeking to obtain from a Territory of the United States revenue for the benefit of the nation as distinguished from that necessary for the support of the territorial government.[216]

In such a situation, it would no longer be plausible to argue that Congress was exercising the equivalent of a local power and therefore not subject to uniformity requirements. But in the present situation, in which Congress merely sought to obtain from the territory revenues in support of the territory's own local government, uniformity requirements would not stand in the way.

Thus not long after the *Insular Cases* controversially allowed Congress to ignore the Uniformity Clause in the unincorporated territories on the novel and bitterly contested ground of their lack of incorporation into the "United States," the *Binns* Court quietly permitted Congress to do exactly the same thing in the incorporated territories, despite their supposed incorporation into the "United States." Yet no one argued that the Constitution did not "follow the flag" to Alaska.

There were, to be sure, some factual differences between *Downes* and *Binns*. The taxes at issue in *Binns* were, arguably, "local" in ways that the duties at issue in *Downes* were not: although in both cases Congress had passed the challenged statute, *Binns* dealt with fees imposed on business conducted within the territory of Alaska,[217] whereas *Downes* dealt with duties on goods traveling between the new territories and the states.[218] At first glance, this distinction between the statutes at issue in the two cases—one mimicking the exercise of a "local" power, another resembling the exercise of a "federal" power and affecting goods crossing state or territorial boundaries—might explain

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215 Id at 494–95.

216 Id at 496.

217 See id at 487, quoting An Act Making Further Provision for a Civil Government for Alaska, and for Other Purposes, 31 Stat 321, 330 (1900).

218 See *Downes*, 182 US at 247.

why the analogy to local government in the territories worked in *Binns*, but would not have worked in *Downes*. The failure of this analogy, in turn, would explain why a distinction between incorporated and unincorporated territories seemed necessary in order to exempt Congress from uniformity requirements in *Downes*: if duties on goods crossing state or territorial lines could not be considered "local," then Congress could not be said to be exercising a "local" power in Puerto Rico, as it was in Alaska, and some other rationale would be needed to exempt Congress from uniformity requirements.

However, a neat distinction between Congress's exercise of a "local" power in *Binns* and a "federal" power in *Downes* does not stand up to scrutiny—like the revenues in *Binns*, the revenues produced by the duties in *Downes* served local purposes, not just obviously, but explicitly. The Foraker Act provided that these duties would cease to be in effect as soon as the Puerto Rican legislature had established a system of local taxation, or within two years, whichever came first.[219] Moreover, Congress had been even more careful to treat these as local revenues than it had been in the case of Alaska. Contrary to the situation in *Binns*, the revenues at issue in *Downes* were not deposited into the federal Treasury, but instead were deposited in a separate fund for use exclusively in maintaining Puerto Rico's local government.[220] The duties in *Downes* thus easily fulfilled the same criteria that the Court relied upon in *Binns* to support the conclusion that the challenged taxes were effectively local taxes.

Nevertheless, both Justice White's concurrence and Chief Justice Fuller's dissent in *Downes*, which together commanded the assent of a total of seven justices, simply denied that the duties at issue in *Downes* could be considered "local": White specifically stated that "the duty in question was not a local tax,"[221] while Fuller argued that the duties amounted to a regulation of commerce between territories and states, and as such involved a national power.[222] This consensus against treating the duties in *Downes* as the product of a "local" power, regardless of the evidence in support of such an interpretation, might explain why the plenary power doctrine that sufficed to uphold the challenged taxes in *Binns* had not seemed sufficient in *Downes*—except that, as noted above, the unanimous Court in *Binns* assumed that the challenged taxes in that case involved the exercise of a federal power

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219 31 Stat at 78.

220 Id.

221 *Downes*, 182 US at 299 (White concurring).

222 See id at 352–54 (Fuller dissenting) ("Conceding that [Congress's] power to tax for the purposes of territorial government is implied from the power to govern territory, ... these particular duties are not local in their nature, but are imposed as in the exercise of national powers.").

within the meaning of the Uniformity Clause (that is, they were "excise" taxes).[223] Yet the *Binns* Court went on to reason that, in the territorial context, even a concededly federal power could be treated as a local power, as long as certain conditions were met—most importantly, that the revenues collected served purely local purposes[224]—while the *Downes* Court declined to rely on the local analogy, though the same conditions had been met in that case.

It may be that the nineteenth-century plenary power doctrine seemed lacking to the justices who advocated the doctrine of territorial incorporation because they wanted to empower Congress to exploit the new territories economically, by allowing it to do precisely what Justice Brewer ruled out with respect to Alaska in his closing passage in *Binns*—namely, "to obtain from a Territory of the United States revenue for the benefit of the nation as distinguished from that necessary for the support of the territorial government."[225] Technically, the doctrine of territorial incorporation permitted this; because it did not rely on an analogy to the exercise of a local power in exempting Congress from uniformity requirements in the unincorporated territories, the doctrine in principle allowed for the imposition of duties intended to produce revenues for the benefit of the federal as opposed to the local government. But even if this was Justice White's aim, it was premature to use *Downes* to achieve it, for Congress, far from indicating any interest in such exploitation, had taken pains to segregate the revenues produced by the challenged duties in order to dedicate them solely to the costs of maintaining Puerto Rico's government. Under those circumstances, the analogy to local government, grounded in the plenary power doctrine, would have served just as well as a ground for upholding the duties challenged in *Downes*.

The comparison between *Binns* and *Downes* drives home the point that a distinction between incorporated and unincorporated territories was unnecessary in order to exempt Congress from constitutional requirements in the new territories—nor could any of the justices have thought such a distinction necessary, when the plenary power doctrine offered such an obvious alternative. The question remains, then, why some of the justices insisted on introducing into the Court's jurisprudence the doctrine of territorial incorporation. What did this idea add to the existing plenary power doctrine, apart from a different rationale for reaching the same results?

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223 *Binns*, 194 US at 491.

224 Id at 494–95.

225 Id at 496.

3. *Dooley II* and the Export Clause.

The holding in *Dooley II* offers still more inadequate support for the standard account of the *Insular Cases*.[226] Indeed, this case lends itself even more easily to revision, for despite its inclusion in the traditional list of *Insular Cases*, it relied primarily on reasoning applicable to all territories, not just unincorporated ones, in exempting Congress from the requirements of the constitutional provision in question. Even Justice White, who concurred separately, seems to have had in mind a distinction between states and territories as a whole, rather than a distinction between different kinds of territories.

In *Dooley II*, the Court held that duties imposed under the Foraker Act on goods shipped from New York to Puerto Rico did not violate the Export Clause.[227] Justice Henry Billings Brown's opinion for the Court relied on a two-part rationale. First, he explained that the words "import" and "export" as used in the Constitution referred to commerce with foreign countries unless accompanied by "some special form of words to show that foreign commerce is not meant."[228] Since the Court had recently held that Puerto Rico (like any other territory) was not foreign, the Export Clause did not bar the challenged duties. This conclusion, Brown acknowledged, raised the question of whether uniformity requirements should go into effect, which brought him to his second point: Congress was exercising the powers of a local government in the territory, so uniformity would not stand in the way—the same reasoning that the Court would use several years later in *Binns*.

Explaining that "it is important to consider whether the duty be laid for the purpose of adding to the revenues of the country from which the export takes place, or for the benefit of the territory into which they are imported," Brown reviewed the evidence in support of the conclusion that the duties in question served local purposes.[229] Because the duties would have been valid if the local legislature of Puerto Rico imposed them, they must be valid "if . . . laid by Congress in the interest and for the benefit of Porto Rico."[230] Brown added that the decision did not imply that Congress could tax "exports" among the states; Congress may not do so because the Uniformity Clause would prohibit it. But "[t]here is a wide difference between the full and paramount power of Congress in legislating for a territory in the

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226 See *Dooley II*, 183 US at 157.

227 Id at 153, 157. See US Const Art I, § 9, cl 5.

228 *Dooley II*, 183 US at 154.

229 Id at 156.

230 Id.

condition of Porto Rico and its power with respect to the States, which is merely incidental to its right to regulate interstate commerce."[231] Although Brown here referred to "territory in the condition of Porto Rico," the distinction at issue, as he had already made clear, was not one between incorporated and unincorporated territories, but one between territories writ large—all of them subject to the "full and paramount power of Congress"—and the states.[232]

As noted earlier, Brown never accepted the doctrine of territorial incorporation,[233] so it is not surprising that he relied on a distinction between states and territories, rather than on a distinction between incorporated and unincorporated territories. More significantly, Justice White's concurrence in *Dooley II* followed suit.[234] White offered a two-part rationale similar to Brown's in support of the holding: first he reiterated the view that the word "export" generally referred to commerce with foreign countries, a category which he now conceded did not include Puerto Rico;[235] and, second, he reasoned that uniformity requirements did not pose an obstacle to such taxes either.[236] White too cited *Downes*, but he declined to "recapitulate the grounds of the conclusion" in that case, and he did not object to Brown's characterization of the case nor explain how his reliance on *Downes* differed from Brown's.[237] Brown, in turn, had explained simply that, in *Downes*, all of the justices agreed "that certain provisions of the Constitution did apply to Porto Rico, and that certain others did not."[238]

White then went on to distinguish between states and territories as a whole (as Brown had done) in order to explain why uniformity requirements did not apply in *Dooley II*. In the closing passage of his concurrence, he noted that the Constitution "safeguards the freedom of commerce and equality of taxation *between the States* by conferring upon Congress the power to regulate such commerce, by providing for the apportionment of direct taxes, by exacting uniformity throughout the United States . . . and by prohibiting preferences between the ports

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231 Id at 157.

232 Id.

233 See note 49.

234 183 US at 157–66 (White concurring).

235 Id at 164. White here explained that the dissent in *De Lima* (written by Justice McKenna and joined by Justices White and Shiras), which had argued unsuccessfully that Puerto Rico remained "foreign" under U.S. tariff laws even after the ratification of the Treaty of Paris, had not been intended to imply that unincorporated territories were not subject to U.S. sovereignty; they were, according to the *De Lima* dissenters, even if they were also still "foreign." See *Dooley II*, 183 US at 163, discussing *De Lima*, 182 US at 216–17 (McKenna dissenting). For further discussion of the *De Lima* dissent, see Part III.A.2.

236 *Dooley II*, 183 US at 165–66 (White concurring).

237 Id at 164–65.

238 Id at 157 (majority).

of different States."[239] White's concurrence thus added little to Brown's reasoning, and itself suggested that the relevant distinction was not one between incorporated and unincorporated territories, but rather one between territories and states.

Despite its inclusion in the standard list of the *Insular Cases*, *Dooley II* does not support the proposition attributed to those cases—that constitutional provisions applied in incorporated territories, as opposed to unincorporated territories. If anything, *Dooley II* offers evidence of the tenuousness of that claim, relying as it did on reasoning applicable to all territories, and on a distinction between territories and states, in exempting Congress from the prohibition in the Export Clause.

4. Jury-related rights in the "United States."

Some of the most emphatic criticisms of the *Insular Cases* have been directed at those decisions withholding the constitutional protections of grand jury indictments and jury trials from the unincorporated territories.[240] In this context above all, the unfairness of the doctrine of territorial incorporation has seemed patent and egregious to scholars, who reject the notion that such rights should be "fundamental" where the people of the United States were concerned, but merely optional when it came to their colonial subjects. Yet, here too, the accusations that have been leveled at the *Insular Cases* have exaggerated and distorted the content and significance of their holdings.

It cannot be denied that the decisions in question—*Mankichi*, *Dorr*, *Rassmussen*, *Dowdell v United States*,[241] *Ocampo v United States*,[242] and *Balzac*—established that federal jury-related rights applied in the territorial courts of the incorporated territories, and not in those of the unincorporated territories.[243] The decision in *Rassmussen*, in which the Court struck down a congressional act providing for juries of six persons in the territory of Alaska, made this much clear. In his opinion for the Court, Justice White explained that the constitutional right to a trial by jury applied in Alaska *ex proprio vigore* because Alaska was an incorporated territory, and struck down a congressional statute providing for juries of fewer than twelve persons on

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239 Id at 166 (White concurring) (emphasis added).

240 See, for example, Ediberto Román and Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 San Diego L Rev 437, 462–63 (2002); Soltero, 22 UCLA Chicano-Latino L Rev at 20–27 (cited in note 126); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 26 Mich J Race & L 1, 29–32 (2000).

241 221 US 325 (1911).

242 234 US 91 (1914).

243 See note 182 and accompanying text.

this ground.[244] Moreover, White made clear that if Alaska had been an unincorporated territory, the challenged act would have been constitutional.[245] And in *Mankichi*, the Court held that federal jury-related protections were inapplicable in Hawaii prior to its incorporation, explaining in the process that after incorporation these rights did apply.[246] In this context at least, then, the incorporated/unincorporated distinction had bite. But even this result needs to be qualified in two ways: first, the distinction between territorial courts and federal courts needs to be taken into account; and, second, the status of the federal Bill of Rights in the states at the time should be considered.

None of the *Insular Cases* held grand jury and criminal jury trial rights inapplicable in federal courts in the unincorporated territories, a point that has different implications for the Philippines and Puerto Rico. The Philippines, like all of the other territories except for Hawaii, Orleans, and Puerto Rico, had a single territorial court system, without a separate federal court system.[247] As a result, the reasoning in *Rassmussen* implied that federal jury-related rights were not protected in the Philippines at all. But Puerto Rico had a distinct federal court, separate from its territorial court system.[248] Although this court was not a court of the "United States" under Article III—its judges did not enjoy tenure or salary guarantees, and the scope of its jurisdiction differed somewhat—it was nevertheless a separate federal court.[249] As a result, with respect to Puerto Rico, *Rassmussen* meant

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244 *Rassmussen*, 197 US at 525–28.

245 Id at 525.

246 190 US at 217–18. White concurred in *Mankichi*, but the opinion for the Court agreed that certain constitutional rights did not apply in Hawaii until Congress extended them by statute. As noted above, see note 55 and accompanying text, eventually a unanimous Court adopted White's doctrine. See *Balzac*, 258 US at 304–06.

247 See Philippine Organic Act § 9, 32 Stat at 695 (providing for the continuation, with modifications, of the Philippine judicial system consisting of municipal courts and a supreme court). For a description of the judicial system established in the Philippines in 1902, see Amy Rossabi, *The Colonial Roots of Criminal Procedure in the Philippines*, 11 Colum J Asian L 175, 200–01 (1997). On courts in the other territories mentioned, see *Sketches of the Establishment of the Federal Courts*, 212 FRD at 672 (cited in note 109), citing Hawaiian Organic Act § 86, 31 Stat at 158 (establishing a separate federal court), and An Act Erecting Louisiana into Two Territories, and Providing for the Temporary Government Thereof § 8, 2 Stat 282, 285–86 (1804) (establishing a separate federal court). In the territory of Alaska, the federal courts were themselves the single judicial system. See *Sketches of the Establishment of the Federal Courts*, 212 FRD at 625–26, citing Alaska Organic Act § 3, 23 Stat at 24 (establishing a district court "with the civil and criminal jurisdiction of district courts of the United States ... and such other jurisdiction ... as may be established by law").

248 See Foraker Act §§ 33–34, 31 Stat at 84 (providing for the continuation, with modifications, of the Puerto Rican judicial system, and establishing separately a federal district court).

249 See *Balzac*, 258 US at 312 (discussing the similarities between the federal court in Puerto Rico and federal courts in the states, while confirming that the former was not an Article III court but rather was created by virtue of Congress's power to legislate for territories under the Territory Clause). On the relationship between Article III and Article IV courts, see *Nguyen*

only that such rights were not protected in local courts—not that they were inapplicable altogether.

The distinction between federal and territorial courts is relevant to an understanding of the consequences of *Rassmussen*, *Mankichi*, and the other *Insular Cases* dealing with federal jury-related rights. On the one hand, *Rassmussen* and *Mankichi* definitely established a constitutional distinction between the two classes of territory: in the unincorporated territories, jury-related rights did not apply in local courts, while in the incorporated territories, these rights applied in local courts. But in Puerto Rico, the only unincorporated territory with a separate federal court, these decisions had different implications, because Puerto Rico's federal court remained unaffected. There, federal constitutional rights applied as they did in the federal courts in the states—or at least the *Insular Cases* gave no reason for supposing otherwise (nor did the actual practice of that court, which used grand and petit juries from its inception[250]).

In this respect, then, Puerto Rico actually occupied a position similar to the states, for the federal Bill of Rights was not considered applicable against state governments, either, at the time, and therefore its jury trial provisions did not apply in state prosecutions (while its grand jury provisions still do not).[251] The status of the Bill of Rights in the states has been the subject of the better-known "incorporation" debate over the applicability of Bill of Rights provisions to the states through the Fourteenth Amendment. As is well known, the Bill of Rights was considered inapplicable against the states until well into the twentieth century. Before then, federal constitutional provisions protecting individual rights restrained federal government action only, while state governments for these purposes were restrained only by their own constitutions. Yet no one ever argued that the Constitution did not "follow the flag" to the states.[252]

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v United States, 539 US 69, 71 (2003) (holding that a federal judge from the District Court for the Northern Mariana Islands could not sit on a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit because he was an Article IV judge and his participation would deprive litigants of a full Article III panel, as required by statute). On the *Nguyen* case and its implications for Puerto Rico, see Chris Mooney, *Second-Class Citizens: The Separate and Unequal Treatment of Our Far-Flung Territories*, Legal Affairs 49 (July 2003).

250 See Cabranes, 49 Fed Lawyer at 43 (cited in note 193).

251 See, for example, Soltero, 22 UCLA Chicano-Latino L Rev at 32–34 (cited in note 126) (discussing particular provisions of the Bill of Rights that are not applied against the states or territories).

252 Although Soltero discusses the parallels between the more familiar "incorporation" debate and the question of whether Bill of Rights provisions apply in the territories, he nevertheless goes on to agree with the standard account of the *Insular Cases*—that they withheld most of the Constitution from the unincorporated territories. See id at 19 & n 100. Meanwhile, Román and Simmons offer an example of the misconceptions that can flow from a failure to take into account the parallel between Puerto Rico and the states in the context of jury-related rights: they

There are, to be sure, limits to the analogy between Puerto Rico and the states: an organic act imposed by Congress on a territory is not a state constitution adopted by the people of a state; declining to assert rights by way of the latter is not the same as failing to confer rights by way of the former. Moreover, the Court did not equate Puerto Rico with the states in these decisions; when it came to the former Spanish colonies, the Court noted the differences, not the similarities, between their legal systems and those of the so-called Anglo-Saxon world.[253] Nevertheless, in view of Puerto Rico's parallel court systems, the analogy to the states has some force, and it sheds light on the ways in which the traditional account has exaggerated the outcome of the *Insular Cases*. A significant difference exists between allowing Congress to act as a quasi-state with respect to jury-related rights in the local courts of a territory, which is what happened in the case of Puerto Rico, and giving Congress license to operate unhindered by the Constitution, which is what scholars claim happened there.

In short, a comparison between Puerto Rico and the states offers additional evidence against the traditional claim that the Constitution applied in full in places within the "United States," but not in those places subject to U.S. sovereignty but outside its boundaries. States were indisputably within the "United States," but jury-related rights did not apply against state governments. Just as the inapplicability of these provisions against the states did not imply the wholesale suspension of the Constitution there, the inapplicability of these rights in Puerto Rico did not imply the wholesale suspension of the Constitution there. In these two contexts, the status of the rights in question depended not on the incorporated/unincorporated distinction, but on a distinction between federal and local government.

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describe as "completely inconsistent" the *Balzac* Court's denial of the Sixth Amendment jury trial rights in Puerto Rico and its assertion that U.S. citizenship had put Puerto Ricans "as individuals on an exact equality with citizens from the American homeland." Román and Simmons, 39 San Diego L Rev at 463 n 154 (cited in note 240), quoting *Balzac*, 258 US at 311. However, although it is true that Puerto Rico was (and still is) not equal to a state in important ways, the denial of Sixth Amendment jury trial rights in *Balzac*, which affected local courts in Puerto Rico, did in fact leave American citizens in Puerto Rico effectively in the same situation as their counterparts in the states—neither had a federal constitutional right to a trial by jury in a local court at the time.

253 But see *Mankichi*, 190 US at 211–12. Interestingly, Brown's opinion for the Court in *Mankichi*, which held that jury-related provisions did not apply in Hawaii for a two-year period following annexation, actually noted the similarities between Hawaii's method of procedure and that of the states. In fact, Brown credited Hawaii with being a leader in reforming jury trial procedures:

> Taking the lead [ ] in a change which has since been adopted by several of the United States, no provision was made for grand juries, and criminals were prosecuted on indictments found by judges. By a law passed in 1847 [in Hawaii], the number of a jury was fixed at twelve, but a verdict might rest upon the agreement of nine jurors.

Id.

As for the Philippines, there the traditional account of the doctrine of territorial incorporation makes some sense. In that context, the distinction between incorporated and unincorporated territories, and the existence of a single judicial system, meant that federal jury-related rights were not protected at all. This is not an insignificant outcome, but it is a far cry from the sweeping conclusion that the *Insular Cases* relegated the unincorporated territories to an extraconstitutional zone.

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The analysis above shows how the traditional interpretation of the *Insular Cases* has overstated their consequences with respect to the applicability of constitutional provisions. Contrary to the standard account, the means for withholding constitutional provisions from the territories were readily available to the Court in the well-established doctrine of plenary power. The justices simply did not need to invent a new class of territories, excluded from the "United States," in order to exempt Congress from constitutional requirements in legislating for the territories annexed in 1898. Nor, apparently, did they think they needed to: as Justice White asserted repeatedly, the distinction between incorporated and unincorporated territories did not map neatly onto a distinction between places in which the Constitution applied in full and places in which most of its provisions did not apply.

Instead, with respect to each of the three constitutional areas that the *Insular Cases* actually addressed—the Uniformity Clause, the Export Clause, and the provisions of the Bill of Rights relating to criminal juries—a closer reading of these decisions and their broader jurisprudential context shows that the applicability of constitutional provisions did not depend on whether a territory was incorporated or unincorporated, or within or outside the "United States." On the contrary, the Uniformity Clause could be held inapplicable—and was—in both incorporated and unincorporated territories. The applicability of the Export Clause depended on a distinction between states and territories, not one between incorporated and unincorporated territories. Incorporation did make a decisive difference with respect to the applicability of the Constitution in the context of federal grand jury and jury trial rights. After *Rassmussen*, it was settled that these provisions applied of their own force in the territorial courts of the incorporated territories, and not in those of the unincorporated territories. But even in this context, the standard account has misstated the doctrinal content of the *Insular Cases* by overlooking the similarity between the unincorporated territories and states. As discussed above, prior to the incorporation of most provisions of the Bill of Rights against the states through the Fourteenth Amendment, the right to a criminal trial

by jury applied in the federal courts of both states and unincorporated territories, and in the local courts of neither; the same, of course, remains true of federal grand jury provisions.

The decisions relating to juries in particular further deepen the mystery of what purpose the distinction between incorporated and unincorporated territories was supposed to serve. In fact, to the extent that White's doctrine resolved the ambiguity in the nineteenth-century jurisprudence by holding jury-related provisions applicable in the incorporated territories, the doctrine actually restrained Congress's flexibility in those territories, rather than enhancing it in the unincorporated territories. As we have seen, nineteenth-century precedents would have made it easy enough for the Court to conclude that the provisions of the Bill of Rights relating to juries (or other constitutional provisions) had never applied in the territories of their own force, but merely by congressional grace (through statutory "extension"). By insisting instead that grand jury and jury trial rights applied *ex proprio vigore* in the incorporated territories, White and the justices who joined him simply succeeded in limiting the scope of congressional action in the incorporated territories.

Why then bother? Why go to the trouble of distinguishing between incorporated and unincorporated territories? In what, precisely, did the doctrine consist if not in a distinction between places in which the Constitution applied in full and places in which only its fundamental provisions applied? Turning to these questions in the next Part, I argue that the pursuit of an altogether different aim accounts for the distinction between incorporated and unincorporated territories—the aim of establishing, as a formal, constitutional matter, that the annexation of territory would not preclude its deannexation. Here, the distinction really did make a difference.

III. A REVISED INTERPRETATION: INCORPORATION AND DEANNEXATION

> By acquisition the United States assume sovereign proprietorship. By admission the land becomes the seat of a self-governing commonwealth. These processes are familiar; but what is "incorporation" here wedged between them? One who fails to recognize this middle stage as established in our polity will not be charged with inexcusable ignorance.[254]

The idea of incorporation set forth in Justice White's concurring opinion in *Downes* baffled the dissenters. "Great stress is thrown upon

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254 Randolph, 1 Colum L Rev at 451 (cited in note 100).

the word 'incorporation,'" wrote Chief Justice Fuller in his dissent, "as if [it were] possessed of some occult meaning, but I take it that the act under consideration made Porto Rico, whatever its situation before, an organized territory of the United States."[255] Justice Harlan was equally confused. "I am constrained to say," he wrote in his separate dissent, "that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel."[256] Justice White indeed offered little by way of a precise definition of incorporation. In addition to the idea that incorporated territories were an integral part of the United States while unincorporated territories were "merely appurtenant thereto as [ ] possession[s],"[257] White's concurrence made clear only that a treaty could not incorporate a territory into the United States without the assent of Congress. The terms of the treaty might promise prompt incorporation, or seek to postpone it, but only Congress could carry incorporation into effect.[258] Beyond that, incorporation remained "enveloped in some mystery."

It is no wonder that White's insistence on the importance of "incorporation" befuddled the dissenters. As we have seen, his own concurrence in *Downes* did not quite establish that incorporation had anything decisive to do with whether the Uniformity Clause applied and, as noted above, he even called into question the existence of a necessary connection between incorporation and the applicability of constitutional provisions.[259] At the same time, a careful reading of White's concurrence in *Downes*, along with the dissenting opinion in *De Lima*,[260] reveals that the doctrine of territorial incorporation did have something to add to the Court's territorial jurisprudence—namely, it established the constitutionality of territorial deannexation. It was this, and not the inapplicability of constitutional provisions, that significantly enhanced congressional flexibility with respect to the unincorporated territories.

In what follows, I review the evidence in support of this claim. In Part III.A, I do a close reading of *Downes* and *De Lima*, examining the relevant language in some detail because so much of it has been overlooked by the scholarship on the *Insular Cases*.[261] Then, in Part III.B, I discuss the turn-of-the-century debate leading up to the *Insular Cases*,

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255 *Downes*, 182 US at 373 (Fuller dissenting).

256 Id at 391 (Harlan dissenting).

257 Id at 342 (White concurring).

258 Id at 319.

259 See Part II.B.1.

260 182 US at 200 (McKenna dissenting).

261 But see Kaplan, *The Anarchy of Empire* at 1–12 (cited and discussed in note 15).

again focusing on contributions that have been overlooked. This debate, I argue, reveals contemporary uncertainties over whether the United States could constitutionally deannex domestic territory. Such concerns, I propose, may well have inspired Justice White's unprecedented doctrine.

A. Incorporation and Permanent Union

1. The "evil consequences" of immediate incorporation: *Downes v Bidwell.*

In his concurring opinion in *Downes*, Justice White did not state in so many words that annexation plus incorporation equals a permanent bond with new territory, but he repeatedly expressed his concern that the annexation of territory would be interpreted as an irrevocable step toward a permanent union, and he tried to refute the assumption by insisting that only incorporation by Congress (rather than annexation alone) could lead to permanence.[262]

For example, White insisted that a rule of immediate incorporation would interfere with the United States' ability to acquire territory, precisely because it would prevent the United States from relinquishing territory. He reasoned:

> Would not [a] war, even if waged successfully, be fraught with danger if the effect of occupation was to necessarily incorporate an alien and hostile people into the United States? . . . Suppose at the termination of a war the hostile government had been overthrown and the entire territory or a portion thereof was occupied by the United States, and . . . it became necessary for the United States to hold the conquered country for an indefinite period, *or at least until such time as Congress deemed that it should be either released or retained because it was apt for incorporation into the United States.* If [the] holding was to have the effect which is now claimed for it, would not the exercise of judgment respecting the retention be so fraught with danger to the American people that it could not be safely exercised?[263]

The "effect" White resisted here was that of the immediate incorporation of territory into the United States following annexation. Why was this dangerous? Not because U.S. sovereignty would confer constitutional equality upon an alien and hostile people—there was certainly no danger of this, for no one had questioned Congress's plenary power

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262 See *Downes*, 182 US at 308, 313 (White concurring).

263 Id at 307–08 (emphasis added).

to govern the territories. The danger of immediate incorporation, rather, lay in that it stripped Congress of the discretion to determine whether the territory "should be either *released or retained*."[264]

White made the connection between incorporation and permanent union more explicit in another passage, addressing the meaning of the power to "dispose of" territory granted to Congress in the Territory Clause.[265] In an effort to refute the view that a treaty ceding territory to the United States would automatically incorporate it, with or without the assent of Congress, he warned that such a view would put incorporation "beyond all future control of or remedy by the American people, since, at once and without hope of redress or power of change, incorporation by the treaty would have been brought about."[266] Those who disagreed with him, he went on, believed that the dangers he described were "more imaginary than real," because they thought Congress "may correct the evil by availing itself of the provision giving to Congress the right to *dispose of* the territory and other property of the United States."[267] But they were wrong, White insisted, because the power to "dispose of" territory did not include the power to let go of it altogether:

> I am not unmindful that there has been some contrariety of decision on the subject of the meaning of the clause empowering Congress to dispose of the territories and other property of the United States, some adjudged cases treating that article as referring to property as such and others deriving from it the general grant of power to govern territories. In view, however, of the relations of the territories to the government of the United States at the time of the adoption of the Constitution, and the solemn pledge then existing that they should forever "remain a part of the Confederacy of the United States of America," I cannot resist the belief that the theory that the disposing clause relates as well to a relinquishment or cession of sovereignty as to a mere transfer of rights of property, is altogether erroneous.[268]

If Congress's power to "dispose of" territory did not, as White feared, encompass the discretion to relinquish or cede sovereignty over such territory, it could not be relied upon to keep the door open to dean-

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264 Id (emphasis added).

265 See US Const Art IV, § 3, cl 2 ("The Congress shall have Power to *dispose of* and make all needful Rules and Regulations respecting the Territory or other Property of the United States.") (emphasis added).

266 *Downes*, 182 US at 313 (White concurring).

267 Id at 314 (emphasis added).

268 Id.

nexation. Thus it was crucial to deny that annexation alone, without the assent of Congress, could effect incorporation.

Those who had argued in the past that the Constitution was not operative in the territories, White continued, had reasoned in part that since the territories had been acquired by purchase, they could also be sold.[269] But,

> it is impossible for me to say at one and the same time that territory is an integral part of the United States protected by the Constitution, and yet the safeguards, privileges, rights and immunities which arise from this situation are so ephemeral in their character that by a mere act of sale they may be destroyed. And, applying this reasoning to the provisions of the treaty under consideration, to me it seems indubitable that if the treaty with Spain incorporated all the territory ceded into the United States, it resulted that the millions of people to whom that treaty related were, without the consent of the American people as expressed by Congress, and without any hope of relief, *indissolubly made a part of our common country.*[270]

The territory had indisputably been annexed, but White insisted that it had not yet been incorporated, warning that incorporation—as opposed to annexation—would create an indissoluble bond.

Linking incorporation to citizenship, White argued that American citizenship also must be withheld from the inhabitants of annexed territory, unless and until Congress was ready to incorporate it. The implications of the contrary view, in White's opinion, were unacceptable: "to avoid the evil consequences which must follow from accepting this proposition [that citizenship must be conferred automatically upon the inhabitants of annexed territory], the argument is that all citizenship of the United States is precarious and fleeting, subject to be sold at any moment like any other property."[271] A grant of American citizenship to the inhabitants of annexed territory, prior to the incorporation of the territory itself, would render that citizenship "precarious and fleeting," because citizenship would now be held by the inhabitants of a territory that Congress might not prove willing to keep.[272] Making the inhabitants of unincorporated territory U.S. citi-

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269 Actually Puerto Rico and Guam were not "purchased," though the United States paid $20 million for the Philippines. See Treaty of Paris, 30 Stat at 1755–56.

270 *Downes*, 182 US at 315 (White concurring) (emphasis added).

271 Id.

272 Of course, White could have reasoned that a grant of citizenship itself would incorporate the territory, thus ruling out the possibility of deannexation. But he did not, and assumed instead that a grant of citizenship alone could not incorporate territory, thus creating an unacceptable situation in which the United States could deannex territory inhabited by its own citizens. The

zens, he reasoned, in a misguided effort "to protect a newly acquired people in their presumed rights," would have the perverse consequence of "degrad[ing] the whole body of American citizenship."[273]

Elsewhere in his concurrence White drew a suggestive connection between what he called "disincorporation" and the "dismemberment" of the Union.[274] As part of his effort to distinguish the territories taken from Spain from their nineteenth-century counterparts, White argued that prior treaties for the acquisition of territory demonstrated an intent to incorporate.[275] In support of this argument, he discussed the language of these earlier treaties, which (in contrast to the Treaty of Paris) usually referred explicitly to the "incorporation" of territory.[276] The dissenters, in turn, rejected the claim that "incorporation" had been used in those earlier treaties as a term of art; they argued instead that all territories subject to U.S. sovereignty had always been a part of the United States, whether or not the treaties ceding them referred specifically to their "incorporation."[277] In response, White accused the dissenters of contradicting themselves: they were, he argued, trying to have it both ways, by claiming both that prior territories had not been incorporated (that is, by denying that "incorporation" was a term of art), and by claiming that the new territories had been incorporated into the United States (that is, by insisting that all territories, including the new ones, were part of the United States). White's criticism made sense, of course, only if one accepted his definition of "incorporation," which was precisely what the dissenters rejected. Ignoring this objection, White further accused the dissenters of trying to "dismember" the Union retrospectively with their contradictory arguments:

> The argument, indeed, reduces itself to this, that for the purpose of incorporating foreign territory into the United States domestic territory must be disincorporated. In other words, that the Union must be, at least in theory, dismembered for the purpose of maintaining the doctrine of the immediate incorporation of alien territory.[278]

Court would later confirm this possibility, holding in 1922 that a collective grant of citizenship to the inhabitants of Puerto Rico did not incorporate the island. See *Balzac*, 258 US at 308.

273 *Downes*, 182 US at 315 (White concurring).

274 See id at 326.

275 See id at 322–35.

276 See id at 324–25, 333–35. But see Treaty Concerning the Cession of the Russian Possession in North America by His Majesty the Emperor of All the Russias to the United States of America, 15 Stat 539, Treaty Ser No 301 (1867) (using language other than "incorporation" with regard to the acquisition of Alaska). White did not quote that treaty.

277 *Downes*, 182 US at 388–89 (Harlan dissenting).

278 Id at 326 (White concurring).

It was a melodramatic flourish to conclude a convoluted argument, but noteworthy because it linked the idea of "disincorporation" to that of "dismemberment," implying a connection between incorporation and the constitution of a permanent union.

To be sure, White's concurrence addressed more than merely the risk of creating an irrevocable bond with new territories. White also warned against applying the requirement of uniformity to the new territories, and against granting citizenship to persons he deemed undeserving of it, for reasons independent of the possibility of permanent union.[279] But, again, a doctrine of territorial incorporation was not necessary to address either of those concerns. As we have seen, White himself rejected the notion that incorporation would necessarily result in the applicability of uniformity requirements, and precedents even existed for delaying the grant of citizenship to territorial inhabitants.[280] The specific danger that the doctrine addressed, in a way that no other available constitutional doctrine could, was the risk that annexation would be taken to imply a permanent commitment of some kind.

His own exception proved the rule. "True," he acknowledged,

> from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress.
>
> But [this] . . . cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of.[281]

As for territories *not* an integral part of the United States, the general proposition stood—these might be deannexed. That, it turns out, was

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279 Id at 306 (reasoning that the right to occupy territory by discovery "could not be practically exercised" if it necessarily entailed "the dislocation of [the U.S.] fiscal system [by the application of uniformity] and the immediate bestowal of citizenship on those absolutely unfit to receive it").

280 See, for example, Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the* Insular Cases, in Burnett and Marshall, eds, *Foreign in a Domestic Sense* 140, 147–48 (cited in note 2) (discussing the language of the Treaty of Guadalupe Hidalgo, which concluded the U.S.-Mexican War in 1848 and provided for U.S. citizenship for the residents of territory annexed by the United States "at the proper time" to be judged by Congress). As Perea points out, the annexation of Mexican territory preceded the enactment of the Fourteenth Amendment, see id at 149; under that amendment, if the territories annexed in 1898 had been treated as part of the "United States," persons born there following the annexation would have been citizens of the United States. This surely was one of White's concerns. However, White believed the option of deannexation must be preserved even if the inhabitants of the new territories were granted citizenship, see notes 271–72 and accompanying text; therefore, his concerns about citizenship alone cannot explain his doctrine and its exclusion of some territories from the boundaries of the "United States."

281 *Downes*, 182 US at 317 (White concurring).

precisely the reason to refrain from incorporating them in the first place.

2. The "grave consequences" of uniformity: *De Lima v Bidwell.*

The case of *De Lima*, decided on the same day as *Downes*, offers additional evidence (albeit somewhat less direct) in support of a deannexationist interpretation of the doctrine of territorial incorporation. In *De Lima*, the Court addressed a challenge to a duty collected on a shipment of sugar from Puerto Rico, after the ratification of the Treaty of Paris but before the passage of the Foraker Act, while Puerto Rico was still governed by the U.S. military.[282] The duty had been imposed pursuant to the Dingley Act, which covered goods from "foreign countries."[283] A five-justice majority, consisting of Justice Brown and the four dissenters in *Downes*, reasoned that Puerto Rico had ceased to be a foreign country upon the ratification of the peace treaty, and had become a domestic territory. As a result, they concluded, duties on Puerto Rican goods could no longer be imposed pursuant to the Dingley Act as if Puerto Rico were "foreign."[284]

A dissent authored by Justice Joseph McKenna and joined by Justices George Shiras, Jr. and White (thus endorsed by the same three justices who signed White's concurrence in *Downes*) insisted that Puerto Rico must remain "foreign" with respect to the tariff laws until Congress dictated otherwise.[285] With the decision in *De Lima*, they lost the semantic argument; however, the result in *Downes*—that uniformity could be ignored with respect to Puerto Rico despite the fact that the island had ceased to be "foreign"—gave them a substantive victory (hence their concurrence with the holding in *Downes*).

It is in light of this substantive victory that the dissent in *De Lima* merits a closer examination than it has received. In its concluding passages, the *De Lima* dissent escalated into a series of urgent warnings about the consequences of the majority's holding that Puerto Rico had ceased to be foreign upon ratification of the treaty. The holding in *De Lima*, declared Justice McKenna, was "fraught with grave consequences":

> It takes this great country out of the world and shuts it up within itself. It binds and cripples the power to make war and peace. It may take away the fruits of victory, and, if we may contemplate the possibility of disaster, it may take away the means of mitigat-

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282 See *De Lima*, 182 US at 180–81.

283 See id at 180, quoting Dingley Act, 30 Stat 151 (1897).

284 See *De Lima*, 182 US at 198–200. The other justices joining the majority opinion were Chief Justice Fuller and Justices Brewer, Peckham, and Harlan.

285 See id at 200–20 (McKenna dissenting).

> ing that. All those great and necessary powers, are, as a consequence of the argument, limited by the necessity to make some impost or excise "uniform throughout the United States."[286]

If the entire Constitution and laws apply immediately upon the acquisition of territory, McKenna continued,

> [n]either we nor the conquered nation would have any choice in the new situation—could make no accommodation to exigency, would stand bound in a helpless fatality. Whatever might be the interests, temporary or permanent, whatever might be the condition or fitness of the ceded territory, the effect on it or on us, the territory would become a part of the United States with all that implies.[287]

These passages deserve scrutiny because *Downes* had already rendered them moot, as far as the imposition of duties was concerned. The dissenters asserted that *De Lima*'s holding—that Puerto Rico was no longer "foreign" to the United States—would have the direst of consequences by requiring uniformity and thereby prohibiting duties on goods arriving from Puerto Rico. But *Downes* was handed down on the same day as *De Lima*, and as the *De Lima* dissenters knew, *Downes* had established the contrary proposition: that uniformity requirements did *not* apply to Puerto Rico, even after it ceased to be foreign, and that duties *could* be imposed upon its goods because Puerto Rico was unincorporated, albeit domestic, territory.

The warnings in the *De Lima* dissent cannot be explained by reference to fearsome implications that had already failed to materialize. Under *Downes*, not only could Congress simply have provided for the continuation of duties in annexed territory; it could have imposed duties at whatever level it chose. Indeed, Congress could have imposed duties upon Puerto Rican goods at ten times the rate applicable to foreign countries under the Dingley Act, if doing so would have preserved "the fruits of victory" and saved the United States from being "bound in a helpless fatality." What, then, were the dissenters in *De Lima* so exercised about?

One explanation for the dissenters' intense resistance to the conclusion of the majority in *De Lima*—that Puerto Rico had ceased to be "foreign"—may be that they thought it would put Congress under too much pressure to act quickly to impose duties, at whatever level,

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286 Id at 218, quoting US Const Art I, § 8, cl 1.

287 *De Lima*, 182 US at 219 (McKenna dissenting).

on goods from conquered territory.[288] According to the holdings in *De Lima* and *Downes*, after the ratification of the treaty of peace the military government ceased to have the power to collect wartime duties, and in order for any duties to be collected, Congress had to act affirmatively, enacting legislation providing for duties immediately. The dissenters in *De Lima*, in contrast, would have preferred that wartime duties remain in effect until Congress replaced them.[289]

But this hardly seems adequate as a complete explanation for the language of the *De Lima* dissent. Even granting that the majority's decision required Congress to act quickly in order to ensure that the collection of duties would continue uninterrupted after a treaty of peace ceding territory, and that the decision therefore risked the possibility of an interruption in the collection of duties, the assertions that such a requirement "takes this great country out of the world and shuts it up within itself," "binds and cripples the power to make war

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[288] Congressional delay in legislating for annexed territory (due to an impasse over the issue of slavery in the territories) had been a problem with respect to California after its cession by Mexico. Consider *Cross v Harrison*, 57 US (16 How) 164, 197 (1853). As Justice McKenna noted in *De Lima*, "The curiosity of [*Cross*] is that all parties cite it, and this court even finds it as convenient and as variously adaptive." *De Lima*, 182 US at 205–06 (McKenna dissenting). McKenna then relied on *Cross* himself. The decision in *Cross* had been the culmination of a series of decisions in some tension with each other, drawing and redrawing the boundary between "foreign" territory and the "United States." In *United States v Rice*, 17 US (4 Wheat) 246 (1819), the Court reasoned that the port of Castine in Maine had become "foreign" for purposes of uniformity while under the control of the British during the War of 1812. Id at 254. In *Fleming v Page*, 50 US (9 How) 603 (1850), the Court reasoned, in apparent contradiction with *Rice*, that the port of Tampico remained "foreign" for purposes of uniformity, although it was under United States control during the war with Mexico. Id at 615–16. In *Cross*, the Court reasoned, apparently contradicting *Fleming*, that the territory encompassing the later state of California had become part of the United States upon its cession by treaty but before congressional legislation providing for its territorial governance. *Cross*, 57 US (How) at 197. Explaining these apparent discrepancies, the *De Lima* dissent found a common theme. In *Rice*, the British had established a customs house, appointed a collector, and provided for the collection of duties in the port of Castine. However, in *Fleming*, Congress had not established a customs house, appointed a collector, or provided for the collection of duties in the port of Tampico (although the military government had). Finally, California, which had been ceded by treaty some time before Congress established a customs house, was an instance of the gradual incorporation Justice White described in *Downes*. See text accompanying note 202. As the *De Lima* dissent read it, this line of cases stood for the proposition that the critical step in the transformation of territory from "foreign" to "domestic" consisted of congressional action specifically indicating an intent to effect that transformation. 182 US at 203–05, 208 (McKenna dissenting). For a thorough and interesting discussion of *Cross*, see Lawson and Seidman, 95 Nw U L Rev at 612–28 (cited in note 45).

[289] Actually, Justice White eventually prevailed on this issue as well. See *United States v Heinszen & Co*, 206 US 370, 379–85 (1906) (holding that Congress had the power to ratify, after the fact, wartime duties continued by the U.S. president on Philippine goods after the islands were ceded by treaty, but before Congress had an opportunity to provide for duties itself, and that even though the president lacked power to impose duties after the cession of the territory, Congress could have delegated such power to him).

and peace," portends "disaster," and causes the United States to "stand bound in a helpless fatality," seem overblown in light of *Downes*.

Instead, a more plausible explanation for these passages is that the dissenters in *De Lima* had more far-reaching consequences in mind than congressional convenience: among them, perhaps, the importance of making it clear that the annexation of territory did not somehow trap the United States in a situation from which it could not escape. This would explain why the dissenters in *De Lima* so fiercely resisted calling Puerto Rico and the other territories acquired from Spain "domestic" territory, even after *Downes* had made clear that their "domestic" status would not subject Congress to uniformity requirements. The problem with conceding that annexed territory had ceased to be foreign to the United States, as White insisted in his concurrence in *Downes*, was that such a transformation could be taken to imply that the territory had come fully within national boundaries, and had been, as White said in *Downes*, "indissolubly made a part of our common country."[290]

This interpretation accounts better for the breathless predictions of the *De Lima* dissenters. If declaring that a place was no longer foreign might imply that it had become forever a part of the United States, their threats of impending disaster would make more sense—as would others elsewhere in the dissent, such as the declaration that "[w]hatever restraint should be put upon [the treaty power] might have to yield to the greater restraints of *life or death*—not only material prosperity, but *national existence*,"[291] and the claim that only a holding that Puerto Rico remained foreign would

> vindicate[] the government from national and international weakness[;] . . . exhibit[] the Constitution as a charter of great and vital authorities . . . with such limitations as serve and assist the government, not destroy it[; and] . . . enable[] the United States to have—what it was intended to have—"an equal station among the Powers of the earth," and to do all "Acts and Things which Independent states may of right do."[292]

The *De Lima* dissenters did not identify the source of the language they quoted in that last passage, perhaps because it was obvious that they were quoting the Declaration of Independence. It was a telling choice of words, since, as I have argued, the doctrine of territorial incorporation effectively preserved the United States' right to declare independence from its new territories.

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290 *Downes*, 182 US at 315 (White concurring).

291 *De Lima*, 182 US at 218 (McKenna dissenting) (emphasis added).

292 Id at 220.

B. Resolving Contemporary Doubts over Deannexation

Writing about the decisions in the *Insular Cases* soon after they came down, Carman Randolph identified the option to relinquish the new territories as one of several goals served by the doctrine of territorial incorporation. "[T]he sponsors of the incorporation theory," he explained, "disclose the apprehensions which have provoked its fabrication," including "the disturbance of our economic system, the extending of citizenship to obnoxious persons, the hampering of our activity in war, *and the difficulty, if not the impossibility of ridding ourselves of undesirable possessions*."[293] Conceding that these indeed constituted "[g]rave apprehensions," Randolph nevertheless saw no need to go to such lengths as the Court had.[294]

Justice White, wrote Randolph, "seems to think that if the Philippines are part of the United States, we cannot sell them to a foreign government, which no one now contemplates, nor recognize a local government under our protectorate, to which some look forward as the best settlement of the Philippine question."[295] White, added Randolph, had discussed "the question of sale from the premise that selling United States territory means selling citizens."[296] But selling land, Randolph insisted, did not amount to selling the people on it, just as buying land did not amount to buying its people.[297] "Given the power to dispose of territory," Randolph went on (disagreeing with White's interpretation of the "dispose of" language in the Territory Clause), "there is nothing in our Constitution to prevent the making of suitable treaty stipulations with its new government in regard to its administration," a move that "would lie within the sphere of foreign relations."[298]

Randolph made it sound easy, but of course the power to dispose of territory, set forth in the Territory Clause, belonged to Congress, whereas the treaty power did not.[299] Arguably, doubts surrounding the possibility of deannexation (including Justice White's insistence that the "dispose of" clause did not include a power of deannexation) had arisen precisely because Congress's power under the Territory Clause did not belong within the sphere of "foreign relations." It was this difficulty that White's doctrine had addressed, by reading into Congress's power under the Territory Clause the discretion to incorporate (or de-

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293 Randolph, 1 Colum L Rev at 457 (cited in note 100) (emphasis added).

294 Id.

295 Id at 459.

296 Id at 460.

297 Id at 461.

298 Id.

299 See Treaty Clause, US Const Art II, § 2, cl 2 (giving the president the power, with the "Advice and Consent of the Senate, to make Treaties").

cline to incorporate) territory. One could have concluded, as Randolph (and others) did, that the power to govern territories simply included the power to give them up, and that nothing further was needed to keep open the option of deannexation. But for those who had doubts, the *Insular Cases* provided the necessary reassurance, as Randolph recognized.

Randolph's comments on the role of the *Insular Cases* in making it possible to "rid[] ourselves of [these] possessions"[300] contributed to a thread of the turn-of-the-century legal debate over imperialism addressing the problem of deannexation that has not received adequate attention. Although the idea that independence was always an option for the Philippines and Puerto Rico has long been taken for granted, a review of the early debate over the legal status of these territories reveals that it was not at all clear, early on, whether separation remained possible once the territory had been ceded to the United States—and that at least some contemporary observers were concerned about it and saw a need to make arguments both pro and con.[301] As one prominent student of the *Insular Cases*, Stanley K. Laughlin, has put it more recently:

> [S]ome anti-colonialists recognized that full application of the Constitution might well have the unacceptable result of making every territorial acquisition irrevocable. If the Civil War had established the indivisibility of this Nation, arguably a territory could never be granted independence once it was incorporated in the Union and its residents made citizens.[302]

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300 Randolph, 1 Colum L Rev at 457 (cited in note 100).

301 The question of whether the United States could cede sovereignty over American territory had been debated earlier in the context of the Oregon boundary dispute with Britain. See, for example, David M. Pletcher, *The Diplomacy of Annexation: Texas, Oregon, and the Mexican War* 327, 332 (Missouri 1973). As Pletcher explains, proponents of "Fifty-Four Forty or Fight" insisted, among other things, that Oregon was American territory, and that neither the president nor the Congress had the power to cede such territory (in that case, to Britain). These "extremist" expansionists (to use Pletcher's description) lost out to more moderate ones when the United States reached a compromise with Britain settling the boundary at the forty-ninth parallel. A full discussion of the Oregon boundary dispute is beyond the scope of this Article, but it is worth noting that the Oregon precedent would not have resolved all of the doubts concerning the constitutionality of territorial deannexation that arose in 1898. Whether the disputed Oregon lands were actually American (as opposed to British) territory was one of the points of contention in that earlier debate, whereas it was undisputed in 1898 that the former Spanish colonies had been ceded to the United States. Congress did not pass an organic act for the territory of Oregon until after the boundary dispute was settled. See Oregon Organic Statute, 9 Stat 323. In addition, the Oregon boundary dispute preceded the Civil War, an event that transformed American ideas about the constitutionality of relinquishing domestic territory. I am grateful to Stanley Katz and David Golove for pointing out the relevance of the Oregon debates.

302 Laughlin, *Law of United States Territories* § 7:2 at 113 (cited in note 2). Although Laughlin referred here to the "full application of the Constitution," my review of the debate suggests

Laughlin does not go on to describe the contemporary debate, nor does he attribute the resolution of these doubts to the *Insular Cases*. But, as I have argued, the doctrine of territorial incorporation did resolve these doubts, by distinguishing between annexation and incorporation, and thus creating a category of territory for which deannexation remained an option—the annexed, but unincorporated, territory.[303]

Although no participant in the contemporary debate denied that the United States might temporarily occupy foreign territory during war, and no one disputed that American military authorities could temporarily govern such territory, a number of these commentators addressed the implications of a territory's ceasing to be "foreign." This transition had—until then—marked the first stage in a process leading ultimately to the admission of a state into the Union. Somewhere in this process lay the point of no return; at some point, a temporary entanglement became a permanent commitment. But when? Only upon admission into statehood? Or sometime earlier?

One contributor to the debate articulated these concerns in stark terms, darkly expressing his fears that the annexation of territory might be taken to imply some sort of permanent bond:

> If the people [of the United States] should hereafter realize that this so-called [imperialist] policy imperils and may wreck our institutions, can they not, and should they not, by their future representative government, repeal unconstitutional laws, release

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that concerns over deannexation were distinct from the debate over the applicability of constitutional provisions traditionally associated with the *Insular Cases*.

[303] In fact, some years later, several articles in the *Virginia Law Review* analyzed whether the United States had the power to alienate sovereignty over the Philippines, as it had promised to do in the Jones Act of 1916, 39 Stat 545. These articles relied on the *Insular Cases* to support arguments on both sides of the question. See Daniel R. Williams, *Is Congress Empowered to Alienate Sovereignty of the United States?*, 12 Va L Rev 1, 5–33 (1925) (arguing that Congress did not have the power to alienate sovereignty over territory, though "the people" did "through the process of constitutional amendment to confer such power on Congress"). Williams quoted relevant passages in White's concurrence denying a congressional power to alienate territory, but neglected to mention the crucial point that White had specifically excepted the unincorporated territories from this reasoning. See id at 14–15. In addition, Williams relied in part on the reasoning that the Philippines had become a part of the United States as a result of its organic act in 1916, though, in light of the *Insular Cases* (which made clear that an organic act does not make a territory part of the United States), this is a questionable claim. For responses to Williams, see Juan Ventenilla, *The Power of the United States to Alienate Federal Territory: With Special Reference to the Philippines*, 12 Va L Rev 607, 621–31 (1926) (arguing that Congress did have the power to alienate sovereignty over the Philippines, and citing *Downes* for support); E. Douglas Hamilton, *In re Alienation of Sovereignty*, 13 Va L Rev 521 (1927) (same). See also F. Harold Smith, *The Right of Congress to Grant the Philippines Sovereign Independence*, 19 Ill L Rev 339, 343 (1925) (arguing against a congressional power to grant Philippine independence by linking the argument in part to the lack of a constitutional right of state secession, and noting that a congressional right to grant independence to a territory "would allow greater freedom to merely potential states than is possessed by the states themselves").

> subjugated people from our dominion, and restore the supremacy of the constitution? Their abstract right to do so is indisputable, but their power to exercise it may be challenged. However anxiously the natives of those islands may plead their claim to independence, small but influential classes will have acquired valuable industrial and commercial interests there, which they may decline to surrender voluntarily. The government, backed by large military power, may then be controlled by organized capital, and future "irrepressible conflicts" may be in store for us before the people regain supremacy.[304]

This passage contains not-so-veiled references to not-so-distant memories of secession, the Civil War, and Reconstruction. Its author seemed less worried about constitutional doctrine than about the ability of a powerful elite to dictate constitutional doctrine and, with it, government policy. In his view, the progression from an imperialist policy, to the assertion by "small but influential classes" that an irrevocable union with unwilling peoples existed under the Constitution, to the imposition of "military power" upon these peoples, to the rise of renewed "irrepressible conflicts," seemed almost inevitable, and frightening.[305]

But most of the commentators who addressed deannexation defended both its feasibility and its constitutionality. One urged that "we are not bound, morally or constitutionally, to shut our eyes to any fair chance of throwing off the burden, without injury to ourselves or to its contents."[306] Still another challenged what he described as the "very singular misapprehension" that territory that "becomes a part of the United States . . . could no more be ceded to a foreign country than one of the States could be."[307] He insisted that nothing in the Constitution stood in the way of ceding annexed territory, and went so far as to assert that "even a portion of a State can be ceded to a foreign government if the State gives its consent that the cession be made"—though he stopped short of claiming that an entire state of the Union itself could be so ceded.[308]

In one of the more detailed contributions to this aspect of the debate, Simeon Baldwin began with the observation that "[t]o acquire, of

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304 Teichmueller, 33 Am L Rev at 212 (cited in note 17).

305 See id. On Southern invocations of Reconstruction during the U.S. occupation of the Philippines following the Spanish-American War, see Blight, *Race and Reunion* at 353 (cited in note 15).

306 Paul R. Shipman, *Webster on the Territories*, 9 Yale L J 185, 206 (1900).

307 Edward B. Whitney, *The Porto Rico Tariffs of 1899 and 1900*, 9 Yale L J 297, 314 (1900).

308 Id at 314 & n 60.

course, is one thing, and to keep, another."[309] He then asked, "If we should be unable or unwilling to hold [the territories annexed in 1898] permanently as a colonial dependence, how could we get rid of such possessions?"[310] He rejected the option of relinquishing them by treaty, on the ground that the Constitution delegated the power over territories to Congress, not to the treaty-making authorities, and argued instead that the deannexation of territory could be accomplished by congressional legislation.[311] Referring specifically to the Philippines, he added for good measure that the power to deannex them did not encompass the power to grant them independence; instead, it merely contemplated ceding them to another power.[312] Either way, though, their annexation was not irrevocable.

These contributions to the turn-of-the-century debate over imperialism reveal that the acquisition of island territories in 1898 reawakened dormant doubts about the constitutionality of territorial deannexation. They show that it was not clear to everyone, at least at first, that the Philippines, Guam, and Puerto Rico could be deannexed after they had been annexed. Justice White's concurrence in *Downes* put these uncertainties to rest by establishing that the acquisition of territory by the United States did not amount to its permanent association with the United States. Annexed territory would not become part of a narrowly defined United States, regardless of evidence to the contrary, until Congress specifically provided for its incorporation. Until then, deannexation remained possible.

The deannexationist content of Justice White's doctrine faded from view in subsequent decisions, even as the distinction between incorporated and unincorporated territories gained adherents on the Court. As explained above, the doctrine came instead to be associated with two other propositions—that the Constitution extended in its entirety only to incorporated territories, and that only they enjoyed an implicit guarantee of admission into statehood. The latter proposition—and its deannexationist corollary—ceased to receive judicial at-

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309 Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv L Rev 393, 409 (1899). Baldwin's is one of the five most often cited contributions to the legal debate on the status of the territories taken from Spain. The others in this group include Abbott Lawrence Lowell, *The Status of Our New Territories: A Third View*, 13 Harv L Rev 155 (1899); James Bradley Thayer, *Our New Possessions*, 12 Harv L Rev 464 (1899); C.C. Langdell, *The Status of Our New Territories*, 12 Harv L Rev 365 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 Harv L Rev 291 (1898). Although these five contributions have received considerable attention from students of the *Insular Cases*, Baldwin's discussion of deannexation has not.

310 Baldwin, 12 Harv L Rev at 410 (cited in note 309).

311 Id.

312 Id.

tention, except for the occasional passing reference to the link between incorporation and eventual statehood.[313] There was nothing further for courts to say; the discretion over incorporation belonged to Congress, and Congress could exercise that discretion by deannexing certain territories. Justice White's doctrine settled this question so successfully that it ceased to be a question; instead, the availability of independence for the unincorporated territories became a background premise in a debate that shifted entirely to the political arena. Thus one will not find a majority of the Court reaffirming a holding that the Philippines, Guam, and Puerto Rico could be deannexed. But by continuing to reaffirm the distinction between incorporated and unincorporated territories, the Court continued to do its part, by helping to perpetuate the notion that the latter were, somehow, not part of the United States.

* * *

In this Part, I have defended a "deannexationist" interpretation of the *Insular Cases* by examining evidence that the scholarship on these decisions has either overlooked or misunderstood. I have demonstrated that Justice White addressed the problem of the relinquishment of territory in his concurrence in *Downes*, and that more than once he described the aim of his doctrine as that of leaving open the option of deannexation (though without using this specific term). I have also suggested that the closing passages of the *De Lima* dissent may best be understood as ultimately concerned with the problem of deannexation. Finally, I have shown that the contemporary debate reflected the existence of doubts about the constitutionality of deannexation, and I have argued that the doctrine of territorial incorporation directly addressed those concerns.

At the same time, I am well aware that the standard account of the *Insular Cases*—that they withheld most, if not all, of the protections of the Constitution from the unincorporated territories—has had real and often detrimental consequences in those territories. Courts at all levels have accepted and reiterated this understanding of the decisions and, in so doing, they have created a legal doctrine attributed to the *Insular Cases*, even if not actually supported by a close reading of these decisions.[314] I recognize that even if I am correct in arguing that the standard account of the *Insular Cases* gets them wrong, that ac-

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313 For some of these passing references, see note 101.

314 For examples, see note 101. I am grateful to Nelson Tebbe for emphasizing this critique of my argument.

count has by now become law, by force of repetition in judicial opinions since 1901. In this, the courts have been inadvertently aided and abetted by well-meaning academic and activist critics of the *Insular Cases* who, in their enthusiasm to condemn those decisions for denying the protections of the Constitution to the inhabitants of the unincorporated territories, have actually helped propagate what I have shown is a misreading of those cases. The overly broad interpretation of the *Insular Cases* that has thus emerged, I believe, has encouraged an excess of creativity in the jurisprudence concerning the territories, with questionable benefits.[315] Moreover, it has facilitated the extension of this problematic doctrine beyond the territorial context.[316]

Nevertheless, a revisionist interpretation can still make a difference. For one thing, scholars and courts can still revisit the original text and context of the *Insular Cases*, rather than citing their doctrine as later interpreted and paraphrased, and in this way narrow the scope of these much-criticized decisions. Moreover, as I argue in Part IV in the context of Puerto Rico, the deannexationist account of the *Insular Cases* has its own significant implications for the current debate over the political status of the unincorporated territories.

IV. PUERTO RICO AND THE LEGACY OF THE *INSULAR CASES*

> Our national entity is coterminous with our physical domain, and will any one assert that our physical domain is not co-extensive with our national entity?[317]

The deannexationist content of the *Insular Cases* not only survives, but continues to have enormous consequences for the unincorporated territories. In Puerto Rico, the largest and most populous of these, the ever-imminent prospect of separation plays a central role in the ongoing debate over the future of the island's relationship to the United States.[318] However, separation plays a somewhat different role

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315 For examples of such cases, see notes 70–73. In these more recent decisions, the courts have often defended the differential treatment of the unincorporated territories on the ground that it protects their distinct cultures and traditions, rather than on the racist grounds that characterized much of the reasoning in the *Insular Cases*. But I am inclined to be unsympathetic even to these recent rationales for differential treatment, which in my view smack of paternalism.

316 See, for example, *Verdugo-Urquidez*, 494 US at 268–69, 274–75 (relying on the *Insular Cases* in support of a holding that the Fourth Amendment did not apply to a search by American officials of a home in Mexico belonging to a Mexican national who was being held in the United States for prosecution in federal court).

317 Charles A. Gardiner, *Our Right to Acquire and Hold Foreign Territory*, 33 Am L Rev 161, 183 (1899).

318 On the status debate, see generally Christina D. Burnett, *The Case for Puerto Rican Decolonization*, 45 Orbis 433, 450–52 (2001); Trías Monge, *Puerto Rico* chs 11–14 at 119–76 (cited in note 5); Frances Negrón-Muntaner and Ramón Grosfoguel, eds, *Puerto Rican Jam: Rethinking*

there than one might expect in a debate over self-determination, figuring most prominently as an option that Puerto Ricans, by and large, hope to eliminate.[319] At the same time, the widespread support among Puerto Ricans for some form of permanent union with the United States has not translated into equally widespread support for the most familiar form of permanent union, statehood; today, only about half of the electorate favors statehood, while another half favors the implementation of a permanent union with the United States short of statehood, known as "enhanced commonwealth."[320] My aim here is neither to rehearse the contentious pros and cons of the "status debate" nor to review it in any detail. Rather, I will emphasize the centrality of the idea of permanent union in this debate, and explain the difference that a deannexationist interpretation of the *Insular Cases* can make.

Although the question of whether to separate from, integrate into, or otherwise "associate" with the United States has deeply divided Puerto Ricans for a very long time, the status debate has yielded broad consensus on at least one point: the desirability of attaining some form of permanent union with the United States.[321] In a 1975 report, a joint U.S.–Puerto Rico presidential advisory group asserted that "the people of Puerto Rico have decided and expressed repeatedly . . . their aim of living in permanent association with the United States."[322] The authors had in mind at least two decades' worth of repeated efforts by Puerto Rican political leaders to secure from the

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Colonialism and Nationalism (Minnesota 1997); Nancy Morris, *Puerto Rico: Culture, Identity, and Politics* Part 1 (Praeger 1995); Raymond Carr, *Puerto Rico: A Colonial Experiment* Part 2 at 105–98 (NYU 1984). The debate includes disagreement over how best to characterize Puerto Rico's relationship to the United States today. See note 23. Although the Supreme Court has observed that Puerto Rico's relationship to the United States "has no parallel in our history," *Examining Board of Engineers, Architects and Surveyors v Flores de Otero*, 426 US 572, 596 (1976), and has asserted that Puerto Rico is "sovereign over matters not ruled by the Constitution," *Calero-Toledo v Pearson Yacht Leasing Co*, 416 US 663, 673 (1974) (internal quotation marks and citation omitted), the Court also has confirmed that Congress continues to govern Puerto Rico, as it governed earlier territories, pursuant to the Territory Clause. See *Harris v Rosario*, 446 US 651, 651–52 (1980) (per curiam).

319 A small but vocal independence movement is the exception. See note 324.

320 On the percentages of support for different status options, see note 324.

321 See, for example, Trías Monge, *Puerto Rico* at 125–35 (cited in note 5) (describing efforts by pro-commonwealth leaders beginning in the 1950s to revise or replace the version of "commonwealth" status instituted in 1952 with a "compact" explicitly recognizing the "permanence and irrevocability of the union between the United States and Puerto Rico," to use the wording of one of the many bills proposed to this effect) (internal quotation marks omitted). See generally Antonio Fernós Isern, *Estado Libre Asociado de Puerto Rico: Antecedentes, Creación y Desarrollo Hasta la Época Presente* (Puerto Rico 2d ed 1988).

322 Proposed Compact of Permanent Union Between the United States and Puerto Rico, approved by the Ad Hoc Committee on the Development of Puerto Rico's Commonwealth Status, August 1, 1975, in Carmen Ramos de Santiago, *El Desarrollo Constitucional de Puerto Rico: Documentos y Casos* 320 (Puerto Rico 2d ed 1985) (author's translation).

U.S. Congress an express confirmation that, under the "commonwealth" status that had been implemented on the island in 1952 (under which Puerto Rico attained a full local self-government, similar to that of a state), Puerto Rico and the United States had created a "compact" of permanent union, irrevocable without their mutual consent. Nothing came of those efforts, and nothing came of the 1975 report, either.[323] In the three decades since, substantial majorities of the Puerto Rican electorate have again expressed their desire for some form of permanent union with the United States, without success.[324] Even during periods when nationalist enthusiasm has dominated public political life on the island, such sentiments have not significantly diminished the level of support for a permanent union with the United States.[325]

As a result of this combination of an almost unanimous desire for permanent union with less substantial support for statehood, Puerto Rico's status debate has largely focused on the "compact" theory. At issue is whether Puerto Rico and the United States may enter into a permanent union, or "compact," without either Puerto Rico becoming a state of the Union, or the United States amending its Constitution. Supporters of the compact theory argue that the answer is yes. Critics of the compact theory argue that, within the current American consti-

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323 The report was submitted to President Gerald Ford in 1975, who rejected the idea of a "compact of permanent union" and proposed that Puerto Rico be admitted as the fifty-first state. See Trías Monge, *Puerto Rico* at 132–33 (cited in note 5).

324 In a 1998 plebiscite, statehood received 46.5 percent of the vote; a "none of the above" option supported by the political party that advocates "enhanced commonwealth" received 50.3 percent of the vote; independence received 2.5 percent of the vote; and the unenhanced or "territorial" commonwealth option—that is, the current status—received 0.1 percent of the vote. See *Elections in Puerto Rico: 1998 Status Plebiscite Vote Summary*, online at http://eleccionespuertorico.org/1998/summary.html (visited June 4, 2005). In a 1993 status plebiscite, statehood received 46.3 percent, enhanced commonwealth 48.6 percent, and independence 4.4 percent. See *Elections in Puerto Rico: 1993 Status Plebiscite Vote Summary*, online at http://eleccionespuertorico.org/1993/summary.html (visited June 4, 2005). Although the option of independence commands widespread respect and gets equal time in political debates, it has little actual support among voters, and for decades it has polled in the single digits.

325 When the controversy over the U.S. Navy's use of Vieques, a small island municipality of Puerto Rico off its northeastern coast, heated up in April 1999 (after an errant bomb killed a civilian guard on Vieques), nationalist sentiment seemed to enjoy a resurgence on the island. See, for example, Amy Waldman, *Prayers Turn Political on the Future of Puerto Rico*, NY Times B3 (Sept 13, 1999). Yet in the 2000 elections, the Independence Party still received only 5 percent of the vote for Puerto Rico–wide offices, although it earned slightly higher percentages in voting for legislators. See *Elecciones en Puerto Rico: Resumen Estadístico de las Elecciones Generales del 7 de Noviembre de 2000*, online at http://eleccionespuertorico.org/2000/cuadros.html (visited June 4, 2005). On the phenomenon of this ambivalent nationalism in Puerto Rico, see generally Carlos Pabón, *Nación Postmortem: Ensayos Sobre los Tiempos de Insoportable Ambigüedad* (Callejón 2002); Ramón Grosfoguel, Frances Negrón-Muntaner, and Chloé S. Georas, *Beyond Nationalist and Colonialist Discourses: The* Jaiba *Politics of the Puerto Rican Ethno-Nation*, in Negrón-Mutaner and Grosfoguel, eds, *Puerto Rican Jam* 1, 10–16 (cited in note 318); Morris, *Puerto Rico* at Introduction, Parts 1–2 (cited in note 318).

tutional framework, only statehood can ensure a permanent union between Puerto Rico and the United States.[326]

The stakes in this constitutional debate are high: if it were somehow settled that a permanent union short of statehood is constitutionally possible, such an alternative might well command an overwhelming majority of the electorate in a referendum on Puerto Rico's political status. If, in contrast, it were somehow established that a permanent union other than statehood is not constitutionally possible, statehood might then garner a substantial majority, as the only means to the widely desired end of permanent union with the United States. Meanwhile, independence advocates (who constitute about 5 percent of the electorate) obviously reject both alternatives, but they too stand to gain from a resolution of the debate over what form a permanent union between Puerto Rico and the United States may take. They aim to persuade Congress to rule out the possibility of a permanent union altogether, whether via statehood or a compact, wagering that such a move would increase support for independence.

Proponents of the compact theory argue that numerous models exist throughout the world that Puerto Rico and the United States could emulate in entering into a nonstate, permanent union.[327] How-

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326 For a concise sampling of the arguments on each side of this debate, by leading exponents of each view, see Juan R. Torruella, *One Hundred Years of Solitude: Puerto Rico's American Century*, in Burnett and Marshall, eds, *Foreign in a Domestic Sense* 241, 244–46 (cited in note 2); José Trías Monge, *Injustice According to Law: The* Insular Cases *and Other Oddities*, in Burnett and Marshall, eds, *Foreign in a Domestic Sense* 226, 235–38. See also Trías Monge, *Puerto Rico* at 170–72 (cited in note 5); Torruella, *The Supreme Court and Puerto Rico* at 133–200 (cited in note 5); Helfeld, 110 FRD at 465–68 (cited in note 40); Arnold H. Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 17 Revista Jurídica Universidad Interamericana Puerto Rico 1, 19–36 & n 86 (1982).

327 See, for example, Roberto P. Aponte Toro, *A Tale of Distorting Mirrors: One Hundred Years of Puerto Rico's Sovereignty Imbroglio*, in Burnett and Marshall, eds, *Foreign in a Domestic Sense* 251, 261–62 (cited in note 2) (giving examples including the European Union and autonomous regions of Spain); Trías Monge, *Puerto Rico* at 141–59 (cited in note 5) (describing the classification of the Marshall Islands, Micronesia, and Palau as free associated states whereby the island governments may conduct foreign affairs in their own name). Proponents of a compact also cite Puerto Rico's Charter of Autonomy of 1897, enacted by Spain in a futile attempt to quell the then-raging war for independence in Cuba by granting increased autonomy to Cuba and Puerto Rico. See, for example, Trías Monge, *Puerto Rico* at 107 ("The compact idea goes back to the Autonomic Charter of 1897."). As Trías Monge observed, the Charter has been "unduly romanticized by many." Id at 15. For instance, it is often said that the Charter gave Puerto Rico the power to negotiate its own treaties, when in fact it simply permitted Puerto Rico to participate in Spain's negotiation of treaties affecting the island. See Carta Autonómica de 1897 Arts 37–38, reprinted in Juan E. Hernández Cruz, ed, *Centenario de la Carta Autonómica de Puerto Rico (1887–1987)* 89, 98 (Interamericana 1998). Advocates of enhanced commonwealth even cite the European Union as a model for a U.S.–Puerto Rico compact, and analogize Puerto Rico's lack of representation in the U.S. government to the European Union's "democratic deficit." See Rafael Hernández Colón, *La Nación de Siglo a Siglo y Otros Ensayos* 232 (Ramallo Bros 1998). Creative arrangements such as these, it is argued, would allocate to Puerto Rico the

ever, no one actually disagrees with them on this point; arguments against the feasibility of the proposed compact do not generally rest on the claim that it cannot be implemented under international law but, rather, on the reasoning that such an arrangement cannot be implemented under the current U.S. constitutional framework.[328] These arguments hold that only statehood (or a constitutional amendment) can secure a permanent union between Puerto Rico and the United States.

Mindful that U.S. constitutional law, not international law, poses the most serious obstacles to the proposed compact, some scholars have argued that the *Insular Cases* themselves offer the groundwork for a permanent compact between Puerto Rico and the United States under American constitutional law.[329] They maintain that, because these decisions gave Congress virtually unfettered discretion in governing unincorporated territories, the Constitution poses essentially no obstacles to the proposed compact between Puerto Rico and the United States. By these lights, the *Insular Cases* gave Congress carte blanche during the heady days of imperialist expansion, and now that broad license can repair the damage of a colonial legacy by authorizing a unique constitutional arrangement, this time purportedly in the interests of the people of Puerto Rico. In this way, goes the argument, the doctrine of territorial incorporation can promote self-determination instead of imperialism. As T. Alexander Aleinikoff puts it, "The infamous *Insular Cases* recognized the need for congressional

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powers it seeks, while creating a union with the United States that could not be altered or terminated except by mutual consent.

328 See, for example, Torruella, 107 Yale L J at 1518, 1522 (cited in note 107); Torruella, *The Supreme Court and Puerto Rico* at 193 (cited in note 5); Grupo de Investigadores Puertorriqueños, 2 *Breakthrough from Colonialism* at 1300–02 (cited in note 7); Carlos R. Soltero, *Is Puerto Rico a "Sovereign" for Purposes of the Dual Sovereignty Exception to the Double Jeopardy Clause?*, 28 Revista Jurídica Universidad Interamericana Puerto Rico 183, 194–97 (1994).

329 See, for example, Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories*, in Burnett and Marshall, eds, *Foreign in a Domestic Sense* 182, 197 (cited in note 2) (describing and expressing sympathy with the argument that "the opportunity [*Downes*] created should be seized" to resolve Puerto Rico's status dilemma); Trías Monge, *Puerto Rico* at 171 (cited in note 5) ("Another element of the colonial debris, one connected to the sovereignty conundrum, is the quaint notion that autonomist options based on the mutual consent idea are not open to the United States, because supposedly one Congress cannot tie the hands of another. This is, of course, sheer nonsense."). Others have made similar arguments in the context of the other unincorporated territories. See, for example, Horey, 4 Asian-Pac L & Policy J at 228 n 151 (cited in note 40) ("It is one of the ironies of history that, while the intent of the *Insular Cases* was to provide flexibility for future imperial expansion, ... their effect in the [Northern Mariana Islands] has been to provide flexibility in the establishment of an autonomous island government."); Laughlin, *Law of United States Territories* § 10:10 at 181 (cited in note 2) ("Ironically, the incorporation doctrine which originally legitimated popular desire to fulfill America's manifest destiny now provides the theoretical basis for assuring a large measure of territorial self-determination.").

flexibility in handling the unanticipated situation of Empire. When that flexibility is now, by mutual consent of metropole and colony, exercised to restore dignity and self-government, why should congressional power suddenly be read narrowly?"[330]

It is arguable, in my view, whether an arrangement that perpetuates the disfranchisement of four million U.S. citizens (who would remain subject to most federal laws) can "restore dignity and self-government" (even with the consent of a majority). But put that issue aside. The deeper problem with arguments of the sort Aleinikoff makes is constitutional: it rests on a familiar misunderstanding of the *Insular Cases*. As I have demonstrated, the *Insular Cases* offered Congress no more latitude in governing territories than it already enjoyed: Congress had *always* exercised plenary power over territories; the Court had *already* cast doubt on the source of constitutional protections in the so-called incorporated territories; and the Court *subsequently* confirmed that most constitutional protections did apply in the unincorporated territories, as elsewhere, while continuing, as before, to equivocate with respect to their source. The idea that the *Insular Cases* may now give sanction to a nonstate, permanent union between Puerto Rico and the United States rests on the premise that those decisions authorized "the extra-constitutional rule of America's colonies,"[331] affording Congress nearly unlimited power in dealing with these territories. But, as we have seen, they did no such thing.

Not only did the *Insular Cases* not give Congress unbridled discretion in the unincorporated territories; what these decisions actually did was to make clear that the annexation of territory into the United States could be followed by its deannexation. The attempt to read into those cases the authority to create a permanent union outside of statehood is therefore not only misguided, but perverse. A constitutional doctrine of territorial deannexation translates awkwardly into the foundational text for a nonstate permanent union. A recognition of the deannexationist content of the *Insular Cases* seriously undermines the extraordinary proposition that these decisions endowed Congress with the power to bind itself to permanent relationships with nonstate entities. Permanent union was precisely what the doctrine of territorial incorporation precluded.

The effort to draft the doctrine of territorial incorporation into service as the basis of a nonstate compact of permanent union misses the mark in more ways than one. Not only does it rely on a misunderstanding of the *Insular Cases*; it also overlooks a much better way that

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330 Aleinikoff, 11 Const Commen at 37–38 (cited in note 98).

331 Beisner, *Twelve Against Empire* at 162 (cited in note 29).

this doctrine can serve the aims of self-determination. A permanent, nonstate union between Puerto Rico and the United States, as noted above, would perpetuate the disfranchisement of Puerto Ricans. Although proposals for a compact seek recognition of Puerto Rico's separate nationality and increased autonomy in certain areas otherwise governed by federal law, they still contemplate the applicability of most federal laws in Puerto Rico, without equal representation for Puerto Rico at the federal level.[332] Enshrining disfranchisement in permanent form, as critics of the compact theory point out, hardly fulfills the aspirations of self-determination. In contrast, a deannexationist interpretation of the doctrine of territorial incorporation serves the aims of self-determination, by preserving the option of separation for any territory subject to U.S. sovereignty and federal law but denied equal representation through statehood.[333] Read this way, and considered in light of twentieth-century developments in the idea of self-determination, this doctrine can be understood to provide fundamental safeguards against the formal and permanent installation of colonial inequality: it confirms the transitional nature of a subordinate status, while ensuring that both full integration into statehood on an equal footing and complete separation into independent nationhood remain available as alternatives that the inhabitants of a territory might choose. To reinterpret the *Insular Cases* so as to permit a compact of permanent union, preventing separation while avoiding statehood, does not repair the damage of colonialism; on the contrary, it perpetuates the harms of disfranchisement. As long as Puerto Rico's relationship to the United States does not ensure equal participation at the federal level, Puerto Rico's potential separation from the

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[332] This resistance to equal representation among proponents of the compact arises out of the recognition that equal representation cannot be attained without statehood. Consider Burnett, 45 Orbis at 444 (cited in note 318).

[333] All of this raises the further question of whether Congress could create a permanent, nonstate union between Puerto Rico and the United States simply by "incorporating" Puerto Rico into the United States. The analysis offered here suggests that it could: if, as I have tried to show, the failure to incorporate a territory served precisely to retain the option of separation, then it would seem to follow that the incorporation of a territory would make it an inseparable part of the United States even before statehood. However, this alternative falls short of a solution to the status problem, too, because all sides in the debate reject it. The proponents of enhanced commonwealth would reject the option of "incorporation" because it implies a denial of Puerto Rican nationality (since it refers to incorporation into the United States), along with the presumptive application to Puerto Rico of all laws generally applicable in the "United States" and a promise of eventual statehood. Since their aim is to ensure both permanent union with the United States and formal recognition of a separate Puerto Rican nationality (while avoiding statehood), incorporation is anathema to them. Statehood supporters would resist "incorporation" without an accompanying promise of statehood because, to them, it represents a further unwarranted delay in the transition toward statehood. Independence supporters would object to "incorporation" for the obvious reasons.

United States should not—and, the *Insular Cases* tell us, cannot—be ruled out.

CONCLUSION

[W]e are not in your house. You are in ours.[334]

I have argued in this Article that the *Insular Cases* of 1901 facilitated American imperialism at the turn of the twentieth century in a counterintuitive way—not by authorizing the extension of empire, but by enabling its retreat. As I have shown, the United States' power to annex territory, subjecting it to a constitutional status different from and subordinate to that of the states, was well settled long before the Court handed down its decisions in the *Insular Cases*. The plenary power doctrine had long provided Congress with broad flexibility in the governance of such territories, and the relevant jurisprudence could easily have supplied the necessary support for federal policies in the territories annexed in 1898. Instead, what the *Insular Cases* contributed to the law of expansion was the option of contraction; the doctrine of territorial incorporation amounted to a constitutional doctrine of territorial deannexation.

The distinction between incorporated and unincorporated territories thus reflected the difference between temporary entanglements and permanent commitments: a temporary entanglement was good enough for an unincorporated territory; but for the incorporated territories—those integral parts of an indivisible nation—only a permanent commitment would suffice. In the unincorporated territory of the Philippines, the temporary entanglement lasted half a century, though the promise of independence came sooner. But in the unincorporated territory of Puerto Rico, the temporary entanglement yielded an indefinite involvement, and with it, an endless debate.

As I suggested earlier, the *Insular Cases* might even be credited with laying the groundwork for a constitutional theory of secession, although of a peculiar kind.[335] Although I have stopped short of developing a full-fledged "secessionist" interpretation of the *Insular Cases* in this Article, such an understanding could be defended in part on the basis of the deannexationist account I have offered here, and in part through a historical investigation moving beyond the cases themselves.

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334 Statement by Juan Mari Brás, Puerto Rican independence advocate, at a 1966 congressional hearing on Puerto Rico's status, in Kal Wagenheim and Olga Jiménez de Wagenheim, eds, *The Puerto Ricans: A Documentary History* 220 (Marcus Weiner 2d ed 2002) (responding to a congressman who expressed a reluctance to "kick out" Puerto Rico "into the cold weather" if it "doesn't want to go").

335 See notes 15–18 and accompanying text.

The value of such an inquiry has been suggested by the evidence, discussed above, that at least some of those who engaged in the debate over imperialism at the turn of the twentieth century had civil conflict very much on the mind: their views on expansion were rooted, at least in part, in their recollections of the Civil War and its aftermath, and in their apprehension that the colonial governance of distant territories could give rise to renewed civil strife.[336]

In *Origins of the New South*, C. Vann Woodward observed that "by 1898 [the North] was looking to Southern racial policy for national guidance in the new problems of imperialism resulting from the Spanish[-American] war."[337] Some anti-imperialists at the turn of the century feared it was the other way around—that the practice of imperialism would somehow make its way back to facilitate further oppression in the states. Moorfield Storey, for instance, is reported to have worried that "[t]he denial of self-government to the Filipinos was wrong in itself, . . . but doubly wrong because it would be used to rationalize the denial of civil and political rights to Negroes at home."[338] In a platform adopted in Chicago in 1899, the Anti-Imperialist League warned that "[t]he real firing line is not in the suburbs of Manila. The foe is of our own household. The attempt of 1861 was to divide the country. That of 1899 is to destroy its fundamental principles and noblest ideals."[339] Thus invoking the memory of the Civil War, the opponents of imperialism cast American global expansion as a threat from within. It was a powerful and telling analogy, for many leading anti-imperialists—like the justices of the Fuller Court—had lived through the Civil War. The memory of that conflict cannot have been far from the minds of the justices as they faced the constitutional issues raised by turn-of-the-century imperialism in the *Insular Cases*: if indeed, despite vociferous dissent, the United States was about to embark on an era of global imperialism—if the acquisition of Spain's former colonies was only the first small morsel of an impending expansionist binge—what species of constitutional conflict might lie on the horizon?

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336 In fact, Justice White himself was a Confederate veteran from Louisiana. See Torruella, *The Supreme Court and Puerto Rico* at 42 n 177 (cited in note 5). Several participants at events where I presented earlier versions of this argument pointed this out; one even wondered whether I was suggesting that White was trying to re-fight the Civil War from his Supreme Court chambers. I would not go so far, but I daresay White did not repress his Civil War memories while he wrote his concurrence in *Downes*. See Part III.A.1.

337 C. Vann Woodward, *Origins of the New South, 1877–1913*, in Wendell Holmes Stephenson and E. Merton Coulter, eds, 9 *A History of the South* 1, 324 (Louisiana State 1951).

338 William B. Hixson, Jr., *Moorfield Storey and the Struggle for Equality*, 55 J Am Hist 533, 539 (1968).

339 Platform of the American Anti-Imperialist League, adopted at the Anti-Imperialistic Conference, Chicago, Illinois (Oct 17, 1899), reprinted in Frederic Bancroft, ed, 6 *Speeches, Correspondence and Political Papers of Carl Schurz* 77, 77–78 n 1 (Negro Universities 1963).

The origins of the American Civil War lay, to a substantial degree, in conflicts that arose from incommensurable ideas about the distribution of civil and political rights across gradients of skin color. Triggered by secession, that war yielded, as a matter of blood-tempered law, one nation, indivisible. To survey the landscape of national politics at the turn of the century was therefore to see the ghosts of an irrepressible conflict rising at the colonial periphery. One defender of imperialism, writing soon after the annexation of Spain's former colonies in 1898, insisted that these new territories must not be granted statehood, for this would "inevitably lead" to a "loose, disunited, and unrelated federation of independent States . . . stretching from the Indian Archipelago to the Caribbean Sea, embracing all climes, all religions, all races—black, yellow, white, and their mixtures."[340] This, surely, was language carefully chosen to invoke disturbing memories of sectional strife and national dissolution. Such imagery intimated all-too-familiar perils: civil conflict, emerging out of racial difference, precipitating constitutional crisis. Here lay the threat posed by the pursuit of global imperialism: it could make "untied states" out of the United States.

Yet this was a defender of empire: for him, the danger lay not in ruling these diverse and distant regions, but in taking the irrevocable step of making them integral parts of an indivisible nation. Hence his warning, not against the annexation of new territories, but against the creation of a permanent bond with them. The people of these new American colonies might become impossible to govern; their demands for independence might become too insistent; opposing notions of how they were to be fitted into the polity might spawn violent conflict. In the face of these threats, the imperative was to ensure that there be no need—no constitutional compulsion—to send in troops to save the Union. As long as annexed territories remained colonies, "belonging to" but not "a part of" the United States, Americans could simply walk away.

The Supreme Court raised this solution to the level of constitutional doctrine—a doctrine that stood for the proposition that the relationship between the United States and its new possessions could, constitutionally, end in separation. Thus did the *Insular Cases* stretch a republican Constitution to embrace a colonial empire.

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[340] Teichmuller, 33 Am L Rev at 207 (cited in note 17) (quoting Whitelaw Reid) (internal citation omitted).